UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAFEWAY STORES, INCORPORATED, BUCHAN BAKING CO., and GEORGE S. BUCHAN, LANGENDORF UNITED BAKERIES, INC., HANSEN BAKING COMPANY, INC., and RICHARD HOYT, *Petitioners,* vs. FEDERAL TRADE COMMISSION, *Respondent.*	No. 19,325

[September 14, 1966]

Petitions to Review An Order Of The Federal Trade Commission

Before: MERRILL, BROWNING, and ELY, Circuit Judges

ELY, Circuit Judge:

Petitioners seek review of a cease and desist order issued by the Federal Trade Commission (FTC). The order relates to unlawful price-fixing acts and practices found to have been committed by the petitioners and others in the sale of bread. The FTC made and entered the challenged order under the authority of section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b). Our power of judicial review is conferred by section 5(c) of the Act.

The petitioners are Continental Baking Company, Langendorf United Bakeries, Inc., Hansen Baking Co., Inc., Safeway Stores, Incorporated, and Richard Hoyt, an officer of Hansen. A number of others were involved in the proceeding, and while the order was directed against them also, they have not sought review.[1] They were held, with petitioners here, to have engaged in a conspiracy wrongfully to fix and regulate the price of bread in the general vicinity of Seattle, Washington.

Three of the petitioning baking companies, together with nearly all others who were charged in the Commission proceeding, were members of a voluntary organization called Bakers of Washington, Inc. This corporation, of which the petitioner Hoyt was vice-president, was also named as a respondent. It was initially incorporated in 1936 in the State of Washington under the name of Bakers of Western Washington, Inc. In August, 1937, the corporate name was changed to its present name. Bakers' members are classified by division according to geographical location. In September, 1961, there were fifty-nine members. More than half of these had places of business in Seattle, but divisions of the association were also located in other Washington cities, Aberdeen, Yakima,

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[1]Petitioners Buchan Baking Co. and George S. Buchan, named in the heading, filed petitions but have offered no briefs in support of their position.

Bellingham, and Tacoma. All dues were paid to Bakers in Seattle. Both wholesale and retail bakeries were included in the mmbership, but within the trade areas served by the association, the great majority was engaged in wholesale distribution.

The Commission contends that much of the wrongful activity was committed through the conduct of Bakers and of two individuals who were its successive secretaries during the period in question. The purposes for which Bakers was formed, as specified by its corporate articles, included the collection and dissemination among its members of all lawful information for the benefit of the business of its members. Petitioners contend that the primary purposes of the association, though not specified in the articles, pertained to its negotiation of labor contracts as a collective bargaining agent for its member companies and its dealing with union labor grievances and with problems concerned with legislative and governmental regulations.

We must first examine petitioners' vigorous challenge of the Commission's power to exercise jurisdiction. It is claimed that the alleged acts and practices, even if wrongfully committed, were not committed "in commerce" within the meaning of section 5 of the Act. Petitioners assert that the challenged activities were wholly intrastate and are thus not

within the intendment of the statute. The FTC insists that its jurisdiction is properly supported by three grounds, (1) sales of bread by certain of the petitioners to Alaskan customers f.o.b. dockside at Seattle, were sales in interstate commerce, (2) bread produced and sold by integrated, multistate corporations Continental, Langendorf, and Safeway is necessarily in interstate commerce, even if all sales were made in only one state, and (3) an unlawful conspiracy between petitioners, Bakers of Washington, Inc., and others, fixing the price of bread in the State of Washington, is an unfair method of competition in interstate commerce regardless of whether or not petitioners' bread sales in the State of Washington are considered to have been made in interstate commerce. We believe that the first ground sufficiently supports the Commission's jurisdiction and that it is unnecessary to examine the other two.

Four of the petitioners, Buchan, Continental, Hansen, and Langendorf regularly sold bread to customers in Alaska, f.o.b. dockside at Seattle.[2] The Alaskan sales by each of these four amounted to less than one percent of its total sales. The prices to Alaskan cus-

[2]In addition to such Alaskan sales other regular out-of-state shipments were made by Safeway and Snyder's Bakery, Inc. Safeway shipped bread from its Seattle plant to an adjoining state and Snyder, a wholesale baker in Yakima, sold bread to retailers in the State of Oregon. On April 1, 1959, Trennery's Bakery Co. in Yakima was acquired by Holsum Baking Company. Thereafter all bread sold by Trennery's in Yakima was imported from Lewistown, Idaho. Petitioners conceded in proceedings before the Commission that this bread sold in Yakima was "'in commerce".

tomers were "regular wholesale prices," determined on the same basis as the prices for sales within Washington State. Therefore, price fixing in the State of Washington necessarily affected the sales to Alaskan customers. The sales to the Alaskan customers were sales in interstate commerce. See *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 290, 66 L. Ed. 239, 42 Sup. Ct. 106 (1921); *Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211, 241, 44 L. Ed. 136, 20 Sup. Ct. 96 (1899); *California Rice Ind. v. FTC,* 102 F.2d 716, 718 (9th Cir. 1939). This is sufficient to fix jurisdiction in the FTC. *E.g., Standard Container Mfr's Ass'n v. FTC,* 119 F.2d 262, 265 (5th Cir. 1941). Petitioners contend, however, that we should ignore the Alaskan sales as a valid basis of jurisdiction by application of the doctrine of *de minimis non curat lex* and because the sales were unrelated to the alleged conspiratorial acts. We have recently held that only $3,086.31 in interstate purchases was sufficient to sustain the jurisdiction of the NLRB over a local cemetery association. *NLRB v. Inglewood Park Cemetery Ass'n,* 355 F.2d 448 (9th Cir. 1966). In that case, we quoted the Seventh Circuit's response to an argument of *de minimis,* "The time has not yet arrived when $2,000 is but a trifle." *NLRB v. Aurora City Lines, Inc.,* 299 F.2d 229, 231 (7th Cir. 1962). Here the amounts involved are substantially greater than the amounts involved in the cited cases. The pro-

visions of the respective statutes granting jurisdiction to the NLRB and the FTC are not identical. The labor statute probably is intended to be more extensive, but the question as to what is *"de minimis"* should not call for different answers. Assuming that the amounts of the Alaskan sales were *"de minimis,"* it would not necessarily follow that the FTC was here without jurisdiction. In *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 225, n.59, 84 L. Ed. 1129, 60 Sup. Ct. 811 (1940), it was written, "the amount of interstate or foreign trade involved is not material (Montague & Co. v. Lowry, 193 U.S. 38), since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected." See also *United States v. McKesson & Robbins, Inc.,* 351 U.S. 305, 310, 100 L. Ed. 1178, 76 Sup. Ct. 806 (1956) (Footnote omitted.), wherein the Court stated,

> "It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; *whether the amount of interstate commerce affected is large or small;* or whether the effect of the agreement is to raise or decrease prices." (Emphasis added.)

See also *Sun Oil Co. v. FTC,* 350 F.2d 624, 631-32 (7th Cir. 1965), *cert. denied,* 382 U.S. 982 (1966).

The Alaskan sales were not wholly unrelated to the activities which the FTC seeks to prevent. The prices

received for these sales, sales which were clearly made "in commerce," were determined in the same manner as sales made in the State of Washington. While it may be that the petitioners intended that their activities affect only those sales made within the State of Washington, the effect was otherwise.

Langendorf and Hansen contend that since they are engaged in the sale of bakery products at wholesale prices only, they could not have conspired to fix and maintain retail prices. The argument is specious. Continental, Langendorf, Hansen, and Buchan all stamp the retail price on the bread wrapper. The wholesale price paid by the retailer is the stamped retail price less twenty percent. This was established by testimony of representatives of the wholesale bakers. Any price-fixing activity with regard to the wholesale price would necessarily have a direct and immediate effect on retail prices.

All of the petitioners contend that the Commission's order is not supported by substantial evidence. We do not agree. Our attention is directed at certain significant and relevant facts.

Representatives of Continental, Langendorf, Hansen, and Buchan regularly attended the meetings of Bakers of Washington, Inc., at the Washington Athletic Club. Meetings were held not less than twenty-

six times annually. During the summer of 1958 meetings were held at which prices were discussed.[3]

On August 11, 1958, Continental, Langendorf, Hansen, and Buchan all put into effect identical increases of two cents per one and one-half pound loaf of white bread, from thirty-one cents to thirty-three cents. The bakery supervisor of Albertson's Stores, Inc., was informed by the secretary of Bakers of a price increase. Petitioners contend that prices were only casually discussed at the Bakers' meeting in connection with negotiation of labor contracts, but the record reveals that price discussions took place, not only prior, but also subsequent to labor negotiations.

On September 19, 1960, Hansen and Langendorf raised prices of the standard one and one-half pound loaf of white bread from thirty-three cents to thirty-four cents. Buchan and Continental made a similar increase three days later.

One example of a price rise after price discussions at the Bellingham division of Bakers took place in 1958. Robert Hall, of Hall's Bakery in Bellingham,

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[3]Albert Pettersen, a former baker supervisor for Albertson's Stores, Inc., owner of a grocery chain, a member of Bakers and a respondent below, testified,

> "Well we discussed the labor, we discussed our price of our material — flour, shortening, sugar. And labor had jumped so high that *they* decided that we should have a raise in our bread. From there we just took it and they said, 'What do you think about certain prices?' and they kicked it around and, so that is as far as it went as long as I sat there." (Emphasis added.)

which had been known as a "cut-rate" bakery, testified that he had been asked by "the representatives of Bakers of Washington, Inc." to join and follow in line with other bakeries in the prices set.

One Schafer, owner of a baking company, testified that a meeting of the Yakima division of Bakers was called subsequent to a price-cutting incident in that city. The meeting was attended by representatives of both wholesale and retail bakers. Schafer's testimony indicates that much of the discussion at the meeting was directed at the expressed need to coordinate prices among the retailers and eliminate "thrift-store" competition. Lalime, who became the secretary of Bakers in November, 1957, was quite active in maintaining prices. The bakery products supervisor of a grocery chain testified that after having lowered his company's price on raisin bread to nineteen cents per loaf, he received a telephone call from Lalime. Lalime informed him that a wholesale baker had complained about the nineteen-cent price and Lalime told the supervisor that he should charge the regular price. On another occasion, this superintendent himself made use of Bakers to combat price cutting. He called up Lalime and complained of the low price of bread in Bellingham. Lalime told him not to cut his prices, "You just wait and let me take care of this." The supervisor testified,

> "Well, Mr. Lalime represents all the bakers here in the State of Washington and he is supposed to kind of keep us all in line, to try to help us all out. That is his job, to keep the people that belong to the association and to keep the prices where they belong."

Robert Hall testified that he had been solicited to join Bakers three times. He was told by Lalime that the purposes of the association were "to make better labor relations, *to maintain prices* and generally better baking conditions." (Emphasis added.)

The foregoing points to only some of the testimony from which it might be reasonably inferred that price-fixing activities occurred. "[T]he function of this Court is merely to make a comprehensive review of the record before the Commission and to determine if the findings are supported by substantial evidence on *such record considered as a whole.*" *Goodman v. FTC,* 244 F.2d 584, 589-90 (9th Cir. 1957) (Emphasis in original.) (Footnote omitted.). See also *Sun Oil Co. v. FTC, supra.* "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c). It is not the province of our court, in reviewing FTC findings, to substitute its own appraisal of the testimony and to pick and choose among uncertain and conflicting inferences. "Statute and decision . . . forbid the exercise of that power." *FTC v. Algoma Lumber Co.,* 291 U.S. 67, 73, 78 L. Ed. 655, 54 Sup. Ct. 315 (1934) (Citation

omitted.) *Stauffer Laboratories, Inc. v. FTC*, 343 F.2d 75, 80 (9th Cir. 1965).

Here, we have a determination of a conspiracy to fix prices. It would be "naive," as Judge Barnes wrote for our court in *Esco Corp. v. United States*, 340 F.2d 1000, 1006 (9th Cir. 1965), "to believe that a formal signed-and-sealed contract or written resolution would conceivably be adopted at a meeting of price-fixing conspirators in this day and age. In fact, the typical price-fixing agreement is usually accomplished in a contrary manner."

Petitioners contend that the FTC erred in finding and holding that a conspiracy existed *solely* upon evidence of general discussions of price levels occasioned by and occurring during discussion of collective bargaining for labor union contracts. They also contend that the FTC erred in determining, upon the *sole* basis of simultaneous or nearly simultaneous price increases, that a conspiracy to set and fix prices existed. We do not believe that the FTC so found and so held. It seems anomalous that petitioners would contend that there were two "sole" bases for the FTC's finding of a conspiracy to raise, set, and fix prices. It is quite true that "even 'pure' conscious parallelism of prices is, standing alone, not unlawful. Nor is an individual competitor's sole decision to follow a price leadership, standing alone, a violation of

law." *Esco Corp. v. United States,* 340 F.2d at 1007. It is of some significance here that at no time was a decrease in price by one of the wholesalers or retailers joined in by all his fellows nor was any such decrease of an enduring nature. The contrary was true when prices were increased. We see more than mere conscious parallelism and the use of the Bakers' forum for the discussion of prices. The vigorous activity of the secretary of Bakers cannot be ignored. His acts were committed under the color of his official authority, and while all those involved apparently knew of his endeavors, none voiced objection to his attempts to keep prices in line by all means chosen by him. In the activities which concern us, he was the agent of the association and the association was the agent of its members.

Safeway contends that it stands apart, that there was no substantial evidence that it participated in the conspiracy. It points to the facts that it was not a member of Bakers and that it charged one cent per loaf less for its house brand of bread than was the prevailing price on the other brands. The existence of the price differential did not compel the Commission to find that Safeway was not a conspirator. See *FTC v. Sun Oil Co.,* 371 U.S. 505, 9 L. Ed.2d 466, 83 Sup. Ct. 358 (1963). It may have been inferred that Safeway enjoyed a position disempowering others to prevent its reducing its price or that it merely fol-

lowed the common practice of many chains in charging less for items sold under house labels, or both. As to its nonmembership in Bakers, the record reveals that Safeway directly paid to Bakers' secretary the sum of $600 per year, an amount equivalent to the maximum annual dues charged for Bakers' members. While Safeway claimed that the consideration was the secretary's individual representation in its labor matters, the Commission was free to infer otherwise.

"Once the existence of the common scheme is established, very little is required to show that defendant became a party — 'slight evidence may be sufficient to connect a defendant to it.' *Nye & Nisser v. United States,* 168 F.2d 846, 852 (9th Cir. 1948), affirmed 336 U.S. 613, 69 S.Ct. 766, 93 L. Ed. 919." *Hernandez v. United States,* 300 F.2d 114, 121-22 (9th Cir. 1962). (Footnote omitted.) Our court made the quoted pronouncement in a criminal case, wherein the Government's burden of proof was greater than that which here rested upon the Commission. As to the alleged conspiracy itself, we hold that there was evidence which, with its inferences, was sufficiently substantial to support a determination that the petitioners "had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement, . . ." *American Tobacco Co. v. United States,* 328 U.S. 781, 810, 90 L. Ed. 575, 66 Sup. Ct. 1125 (1946). See also *Continental Baking Co.*

v. United States, 281 F.2d 137 (6th Cir. 1960). We also hold that there was substantial evidence to support findings that each of petitioners, including Hoyt, a Hansen officer and Bakers vice-president, participated.

Continental alleges error in the denial of its motion to disqualify Commission Chairman Dixon from participating in the proceeding. Dixon became chairman of the FTC in March, 1961. In 1959, in his then capacity as Chief Counsel and Staff Director of the Antitrust and Monopoly Subcommittee of the United States Senate, he participated in a Subcommittee hearing on administered pricing in the bread industry. He interrogated Continental's president, and it is urged that his questions suggest such a fixed view on one aspect of the present controversy that we should overrule the Commission's determination that he was not disqualified. Continental points to one of the questions which Dixon put to its president in 1959, which was, "You don't want to leave the impression that your independent plant managers have the right to make a major price change without your approval, do you?" It is claimed here that the question reveals Dixon's definite opinion that Continental's "independent" plant managers could not effect a major price change without the approval of the president. We do not agree that an attorney's personal opinion on a

factual controversy may be inferred from questions he puts in the performance of his professional duty. Moreover, if the existence of an opinion which Dixon would retain for two years could be inferred from the quoted question, the answer given by Continental's president reveals that he himself agreed with the opinion claimed to have been entertained by Dixon.

Continental relies on *Texaco, Inc. v. FTC,* 336 F.2d 754 (D.C. Cir. 1964), *vacated and remanded on other grounds,* 381 U.S. 739, 14 L. Ed.2d 714, 85 Sup. Ct. 1798 (1965), in which it was held that Chairman Dixon was disqualified from joining in a Commission order. There, the basis was a statement made by Dixon in a speech delivered while the controversy was pending before an FTC examiner and before it had been submitted to the Commission. A disinterested reader of his speech, wrote the D.C. Circuit, "could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the act." 336 F.2d at 760. This is a different case. There is nothing here to indicate that Chairman Dixon has "taken a position apparently inconsistent with an ability to judge the facts fairly, . . ." 336 F.2d at 764 (Washington, J., concurring in part and dissenting in part). We refuse to hold that, on the basis of the questions asked of Continental's president by Chairman Dixon, then not a member of the Commission, prior to the initiation of the present proceedings, and not includ-

ing a statement of opinion as to an ultimate controverted issue which he would judge; a disinterested observer would have reason to believe that he had prejudged the dispute. See *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir.), *cert. denied*, 361 U.S. 896, 4 L. Ed.2d 152, 80 Sup. Ct. 200 (1959); *Texaco, Inc. v. FTC, supra* at 764.

Dixon's disqualification was sought under the provisions of section 7(a) of the Administrative Procedure Act. It provides, ". . . Any such [presiding officer or officer participating in the decision] may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a *timely* and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case." 5 U.S.C. § 1006(a) (Emphasis added.). The motion for disqualification was not "timely." Continental became involved in this proceeding in April, 1961. The Hearing Examiner's decision was issued July 20, 1962. Continental prosecuted its appeal, filed its briefs, and argued orally to the Commission, with Chairman Dixon participating, on January 9, 1963. On February 28, 1964, the Commission's decision on the merits was handed down. Not until October 21, 1964, nine months after the Commission had issued its decision and opinion, did Continental claim for the first time that Dixon was prejudiced and not qualified. Continental

was always fully knowledgeable, of course, as to the extent of Dixon's participation, over five years earlier, in the Senate hearings. In these circumstances, it could not remain silent, await the decision of the Commission, and then, doubtless because of its disappointment, seek for the first time to asperse the objectivity of a quasi-judicial officer who joined in the challenged opinion.

In *American Cyanamid Co. v. FTC,* Nos. 15805, 15797, 15801, 15806, and 15788, June 16, 1966 (6th Cir.), it was held that Chairman Dixon was disqualified. In that case it appears that he took a much more active part in the investigation of the drug industry when he had been Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate than he did in the hearings related to the case at bar. Furthermore, the petitioners in *American Cyanamid* filed their motions for disqualification almost immediately after their noticing appeals from the Hearing Examiner's initial decision.

Petitioners Langendorf, Hansen, and Hoyt contend that the Commission erred in taking official notice and incorporating in the record findings of another Commission proceeding, In re Continental Baking Co., Dkt. 7630, October 27, 1959. These three petitioners were not parties to that proceeding. They urge

that the taking of such official notice was in violation of sections 7(c) and (d) of the Administrative Procedure Act, 5 U.S.C. § 1006(c), (d) and the Fifth Amendment. Safeway also complains. Continental argues that the taking of such official notice was error because the issue to which that testimony was addressed was central and disputed in the present controversy and because the Commission adhered to its reliance after Continental had "proved" facts to the contrary.

The question relates to compliance with section 1006(d), which provides in pertinent part, "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."

While all parties were given the "opportunity," only Continental chose to attempt to show the contrary to the matter officially noticed. The remaining petitioners, not having followed the statutory requirement, must be held to have waived objections.

The officially noticed material came from a Hearing Examiner's decision involving Continental which was then, in 1959, charged with illegal price discriminations and discriminatory payments in violation of 15 U.S.C. § 13(a), (d). Continental had been accused of granting discriminatory price concessions and dis-

criminatory promotional allowances to certain favored customers. The Examiner's decision was that the complaint should be dismissed, and his decision was affirmed by the FTC on December 31, 1963. The noticed matter related to the structure and operation of Continental's business. It included, as is recited in the Commission's opinion, corporate organization, territorial assignments, purchasing, production, pricing, money collected from sales, accounting, personnel, insurance, engineering, vehicles, sales, labor relations, packaging, and advertising.

The Commission included the material in its opinion as foundation for its conclusion that Continental's operation in the State of Washington was "in commerce." Couching the conclusion on this point in terms of the Supreme Court decision in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 88 L. Ed. 1440, 64 Sup. Ct. 1162 (1944), the Commission wrote,

> "Its local sales agent can easily agree to deliver on consignment a dozen loaves of 'Wonder' bread every Monday, but 'innumerable transactions,' many of them directly 'in' interstate commerce, are 'necessary to performance.' The work of Continental's driver-salesmen is merely the peak of the ice-berg; beneath it, sunk deep into the stream of interstate commerce, is the real body of the transaction.
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> "We find that all of Continental's sales in the State of Washington were 'in' interstate commerce. All of them involved a New York seller

> and a Washington buyer. Each of them was an indivisible part of a host of 'transactions * * * [that] constituted a single continuous chain of events, many of which were multistate in character, and none of which, * * * could possibly have been continued but for that part of them which moved back and forth across state lines.' *South-Eastern Underwriters, supra,* 322 U.S. at 537."

We have already expressed our opinion that the jurisdiction of the Commission was properly founded upon the interstate, Alaskan sales. Since the Commission's application of the officially noticed material was obviously limited to an alternative basis of jurisdiction, it is unnecessary to dwell upon the propriety of the reliance.

Petitioners contend that *Flotill Prods., Inc. v. FTC,* No. 19521, decided by a panel of our court on March 15, 1966, requires a remand to the Commission.

In *Flotill,* only two of the three participating members of the Commission voted affirmatively for the challenged order. Our court held that a majority of the five-member Commission must join in issuing a valid order and remanded the case to the Commission. The case was resubmitted to the court en banc and the panel decision sustained with four of our nine judges dissenting. ....F.2d.....

In the present proceeding the Commission made two decisions. The first, ordering the petitioners to cease and desist from fixing prices, was issued by a three-to-

one vote. It was held that an unfair act or practice was shown by the record, that all respondents below were legally responsible therefor, and that the Commission had jurisdiction under section 5 of the Federal Trade Commission Act to issue a cease and desist order. Thereafter, upon Continental's motion, the Commission stayed the issuance of its order and remanded the case to the Hearing Examiner to permit Continental to attempt to prove the contrary of the officially noticed facts. After further hearings, and despite an attempted showing of facts contrary to those officially noticed, the Commission by a two-to-one vote affirmed its original decision and directed that the order issued by the three-to-one vote to be made effective.

Continental says that *Flotill* "requires the remand to the Commission for further consideration of the question decided by less than a majority of the Commission — that an unfair act or practice *in commerce* was established." We disagree. Our decision as to the existence of the "in commerce" requirement of the Act is based upon the interstate character of the activities resulting from the Alaskan sales and not upon the possible interstate nature of Continental's overall operations. Thus, though *Flotill* would perhaps be applicable if we sustained the Commission's alternate ground for its exercise of jurisdiction, the decision is of no present consequence.

Finally, petitioners challenge the scope of the cease and desist order, quoted below[4], as being excessively and unreasonably broad. In our judgment the order withstands the challenge. We are taught that "unless the remedy bears no reasonable relation to the existing unlawful practices, the Commission's discretion as to the scope of the order should not be disturbed. Federal Trade Commission v. National Lead Co., 1957,

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[4]"ORDER

IT IS ORDERED that the respondent Bakers of Washington, Inc., an incorporated association, and respondents George B. Buchan, Richard Hoyt, and Arthur H. LaLime, individually and as officers of respondent association, and their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of bread, do forthwith cease and desist from:

Entering into, carrying out, continuing or cooperating in any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or members of Bakers of Washington, Inc., or between any one or more of them and others not parties hereto, where any one or more of the parties to that planned common course of action, understanding, agreement, combination or conspiracy is selling bread in interstate commerce in competition with bread sold by any one or more of the other parties thereto, to do or perform any of the following things:

(1) Establish, fix or maintain prices, terms or conditions of sale of bread,

(2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or

(3) Deter or attempt to deter any competitor from exercising his individual judgment as to prices, terms or conditions of sale of bread.

IT IS FURTHER ORDERED that the respondents Buchan Baking Co., Continental Baking Company, Langendorf United Bakeries, Inc., Hansen Baking Co., Inc., Trenerry's Bakery Co., and Snyder's Bakery, Inc., corporations, John M. Larson, trading as Larson's Bakery, and Vic H. Goethals, trading as Fortune's Bakery, all members of respondent association, and the following members of said association, not named as respondents herein, Ashbrook Bakeries Corp., 1407 11th Avenue, Seattle, Washington; Albertson's Inc. 17000 Aurora Avenue, Seattle; Baders' Dutch Bakeries, 3755 University, Seattle; Baker Boy Bakery, 8050 Bothell Way, Seattle; Bake-Rite Bakery, 1414 14th Avenue, Seattle; Bellinger Bakery, North Bend; Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle; Big Four Donut, Inc., 319 Nickerson Street, Seattle; Blake's Bakery, Inc.,

352 U.S. 419, 428-429, 77 S.Ct. 502, 1 L.Ed.2d 438." *Gellman v. FTC,* 290 F.2d 666, 670-671 (8th Cir. 1961). It can hardly be denied that the challenged order bears a "reasonable relation" to the practices found by the Commission to have been unlawful.

In *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 392, 13 L.Ed.2d 904, 85 Sup. Ct. 1935 (1965), the Supreme

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4729 California Avenue, Seattle; Bookter's Seattle Bakery, Inc., 3409 4th Avenue South, Seattle; Butter-Krisp Bakery, Inc., 2203 23rd Avenue South, Seattle; Boldt's Western Hotels Food Service, Inc., Boeing Cafeteria, Boeing Plant #2, Seattle; Carolyn's Cakes, 518 15th Avenue North, Seattle; Caster's Lake City Bakery, 12532 Bothell Way, Seattle; Frederick & Nelson (Bakery Department), 5th at Pine, Seattle; Gai's Seattle French Baking Co., Inc., 2006 Weller Street, Seattle; Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle; Grandma Cookie Baking Co., Inc., 3402 Wallingford Avenue, Seattle; Karl's Bakery, 1614 Hewitt Avenue, Everett; Kent Bakery, 213 First South, Kent; Lippman's Bakery, Inc., 119 23rd Avenue, Seattle; Lindsay's Thriftway Market, 11100 Roosevelt Way, Seattle; Manning's, Inc., 621 Seaboard Building, Seattle; Richard's Fried Pies, Inc., 220 1st Avenue, North, Seattle; Swiss Pastry & Candy Shop, 1325 5th Avenue, Seattle; Smith & Sonnleitner Cookie Co., 1238 No. 99 W., McMinnville, Oregon (7710 Bagley, Seattle, Washington); Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue North, Seattle; Grand Central Bakery, Market & H Streets, Aberdeen; Swanson's Foods, Inc., 1401 Simpson Avenue, Aberdeen; Veldkamp's Olympic Bakery, 417 W. Wishkah Street, Aberdeen; Bame's Ye Olde Home Bakery, Riverside, Mount Vernon; Bellingham Baking Company, 2001 State Street, Bellingham; City Bakery, 607 1st Street, Mount Vernon; Thrifty Foods, 130 Fairhaven Avenue, Burlington; Golden Rule Bakery, Inc., 915 Center Street, Tacoma; Jordan Baking Company, 3623 S. 54th Street, Tacoma; Eddy Bakeries Company, Inc., 232 S. Front Street, Yakima; Sigman Food Stores, P. O. Box 618, Yakima; Miss Maud Pemberton, Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle; Henry Richards, Continental Baking Company, P. O. Box 3227, Seattle; Lloyd C. Mitchell, Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue North, Seattle; Lou Blackfield, Bake-Rite Bakery, 1414 14th Avenue, Seattle; Horace Snyder, Snyder's Bakery, Inc., 31 North 4th Street, Yakima; Al Moore, Langendorf United Bakeries, Inc., 2901 6th Avenue South, Seattle; Roy Reynolds, Grandma Cookie Baking Co., Inc., 3402 Wallingford, Seattle; LeConie Stiles, Jr., Ashbrook Ruth Bakeries Corp., 1407 11th Avenue, Seattle; Henry Gai, Seattle French Baking Co., Inc., 2006 Weller Street, Seattle; Donald R. Due, Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle; and Maurice Bybey, Baker-Roy Bakery, 8050 Bothell Way, Seattle; and their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of bread, do forthwith cease and desist from:

Court repeated its opinion in *FTC v. Cement Institute,* 333 U.S. 683, 726, 92 L.Ed. 1010, 68 Sup. Ct. 793 (1948), that "an order's prohibitions 'should be clear and precise in order that they may be understood by those against whom they are directed,' * * * *" 380 U.S. 392. Here the Commission has directed that the petitioners shall not engage in a conspiracy to

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Entering into, carrying out, continuing or cooperating in any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or members of Bakers of Washington, Inc., or between any one or more of them and others not parties hereto where any one or more of the parties to that planned common course of action, understanding, agreement, combination or conspiracy is selling bread in interstate commerce in competition with bread sold by any one or more of the other parties thereto, to do or perform any of the following things:

(1) Establish, fix or maintain prices, terms or conditions of sale of bread,

(2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or

(3) Deter or attempt to deter any competitor from exercising his individual judgment as to prices, terms or conditions of sale of bread.

"IT IS FURTHER ORDERED that Safeway Stores, Inc., and Holsum Baking Company, corporations, respondents, but not members of the respondent association, and their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of bread, do forthwith cease and desist from:

Entering into, carrying out, continuing or cooperating in any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or members of Bakers of Washington, Inc., or between any one or more of them and others not parties hereto, to do or perform any of the following things:

(1) Establish, fix or maintain prices, terms or conditions of sale of bread,

(2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or

(3) Deter or attempt to deter any competitor from exercising his individual judgment as to prices, terms or conditions of sale of bread."

"(1) Establish, fix or maintain prices, terms or conditions of sale of bread,

(2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or

(3) Deter or attempt to deter any competitor from exercising his individual judgment as to prices, terms or conditions of sale of bread."

To us, these injunctions seem clear, and we are unable to accept the contention that they are so imprecise as not adequately to warn a reasonable man of the prohibited activities in which he shall not continue to engage.[5]

> "It has been repeatedly held that the Commission has wide discretion in determining the type of order that is necessary to cope with the unfair practices found, e. g., *Jacob Siegel Co. v. Federal Trade Comm'n.* 327 U.S. 608, 611, and that Congress has placed the primary responsibility for fashioning orders upon the Commission, *Federal Trade Comm'n v. National Lead Co.,* 352 U.S.

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[5]Commissioner Elman, dissenting, believed the order to be insupportably broad. He suggested that the order should have been made so specific as

> "to forbid not only the conspiracy itself but also the specific acts and practices upon which the effectiveness of the conspiracy – its translation into actual anticompetitive conduct – depends."

Commissioner Elman continued,

> "It is immaterial that these acts and practices may be lawful in themselves; the Commission has ample power to forbid them if necessary to ensure that the conspiracy will cease and not be resumed. *F.T.C. v. National Lead Co.*, 352 U.S. 419, 430."

We agree that the Commission, applying its expertise, might have properly chosen to issue an order containing prohibitions against specific acts. Obviously, however, it determined that there was no pressing need that it do so. We would not order the Commission to amend its order so as to impose upon the petitioners specific prohibitions more severely restrictive than the Commission, from its review of the evidence, believed to be required.

> 419, 429. For these reasons the courts should not 'lightly modify' the Commission's orders. *Federal Trade Comm'n vs. Cement Institute,* 333 U.S. 683, 726."

FTC v. Colgate-Palmolive Co., supra, 380 U.S. at 392.

Some of the petitioners claim that the order is overbroad because it would regulate their conduct throughout the nation even though the activity found to be illegal took place in only one area of the country. We do not believe the complaint is justified. Since the order is sufficiently specific and since it prohibits only conduct which is *per se* illegal under the Act, we do not think it is objectionable simply because its application is made as broad as petitioners' business activities. As the Commission concluded, "there is no reason to suppose that an entity showing no reluctance to fix prices in Seattle, Washington, would act differently in another city or another state" in which it does business. In a comparable situation the Court of Appeals for the Fourth Circuit stated, "As to territorial extent, the company, having been found guilty of a flagrant violation of the Act, was properly required to cease and desist from such practices in all areas in which it was doing business." *Maryland Baking Company v. Federal Trade Commission,* 243 F.2d 716, 718 (4th Cir. 1957). See also *Foremost Dairies, Inc. v. Federal Trade Commission,* 348 F.2d 674 (5th Cir. 1965).

Affirmed.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

In the Matter of

BAKERS OF WASHINGTON, INC., an incorporated association, its officers, Board of Trustees, employees, representatives and agents, including but not limited to the following:
GEOGRE B. BUCHAN,
RICHARD HOYT,
ARTHUR H. LALIME;
the following named members of respondent association:
BUCHAN BAKING CO.,
CONTINENTAL BAKING COMPANY,
LANGENDORF UNITED BAKERIES, INC.,
HANSEN BAKING CO., INC.,
TRENNERY'S BAKERY CO.,
SNYDER'S BAKERY, INC., corporations.
JOHN M. LARSON, trading as LARSON'S BAKERY,
VIC H. GOETHALS, trading as FORTUNE'S BAKERY,
each individually and as a member of the respondent association and all as representative of all of the members of respondent association;
SAFEWAY STORES, INC. and
HOLSUM BAKING COMPANY, corporations.

Docket No. 8309

FINAL ORDER

This matter having been heard by the Commission upon exceptions to the hearing examiner's initial decision filed by respondents and upon briefs and oral arguments in support thereof and in opposition thereto; and

The Commission having rendered its decision and having determined that the initial decision should be modified in accordance wit hthe views expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

IT IS ORDERED that the findings of fact in the initial decision be, and they hereby are, modified by adding to finding number 26, page 10 of the initial decision, the further findings set forth in the paragraphs designated "A" through "O" beginning on page 15 and extending through the second paragraph on page 20 of the accompanying opinion.

IT IS FURTHER ORDERED that in lieu of the order to cease and desist contained in the initial decision, the following be, and it hereby is, entered as the order of the Commission:

IT IS ORDERED that respondent Bakers of Washington, Inc., an incorporated association, and respondents George B. Buchan and Richard Hoyt, individually and as officers of respondent association,

and respondents Buchan Baking Co., Continental Baking Company, Langendorf United Bakeries, Inc., Hansen Baking Co., Inc., Trennery's Bakery Co., and Snyder's Bakery, Inc., corporations, John M. Larson, trading as Larson's Bakery, and Vic H. Goethals, trading as Fortune's Bakery, all members of respondent association; and the following members of said association: Ruth Ashbrook Bakeries Corp., 1407 11th Avenue, Seattle, Washington; Albertson's, Inc., 17000 Aurora Avenue, Seattle; Baders' Dutch Bakeries, 3755 University, Seattle; Baker Boy Bakery, 8050 Bothell Way, Seattle; Bake-Rite Bakery, 1414 14th Avenue, Seattle; Bellinger Bakery, North Bend; Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle; Big Four Donut, Inc., 319 Nickerson Street, Seattle; Blake's Bakery, Inc., 4729 California Avenue, Seattle; Bookter's Seattle Bakery, Inc., 3409 4th Avenue, South, Seattle; Butter-Krisp Bakery, Inc., 2203 23rd Avenue South, Seattle; Boldt's Western Hotels Food Service, Inc., Boeing Cafeteria, Boeing Plant #2, Seattle; Carolyn's Cakes, 518 15th Avenue, North, Seattle; Caster's Lake City Bakery, 12532 Bothell Way, Seattle; Frederick & Nelson (Bakery Department), 5th at Pine, Seattle; Gai's Seattle French Baking Co., Inc., 2006 Weller Street, Seattle; Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle; Grandma Cookie Baking Co., Inc., 3402 Wallingford Avenue, Seattle; Karl's Bakery, 1614

Hewitt Avenue, Everett; Kent Bakery, 213 First South, Kent; Lippman's Bakery, Inc., 119 23rd Avenue, Seattle; Lindsay's Thriftway Market, 11100 Roosevelt Way, Seattle; Manning's, Inc., 621 Seaboard Building, Seattle; Richard's Fried Pies, Inc., 220 1st Avenue, North, Seattle; Swiss Pastry & Candy Shop, 1325 5th Avenue, Seattle; Smith & Sonnleitner Cookie Co., 1238 No. 99 W., McMinnville, Oregon (7710 Bagley, Seattle, Washington); Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue, North, Seattle; Grand Central Bakery, Market & H Streets, Aberdeen; Swanson's Food, Inc., 1401 Simpson Avenue, Aberdeen; Veldkamp's Olympic Bakery, 417 W. Wishkah Street, Aberdeen; Bame's Ye Olde Home Bakery, Riverside, Mount Vernon; Bellingham Baking Company, 2001 State Street, Bellingham; City Bakery, 607 1st Street, Mount Vernon; Thrifty Foods, 130 Fairhaven Avenue, Burlington; Golden Rule Bakery, Inc., 915 Center Street, Tacoma; Jordan Baking Company, 3623 S. 54th Street, Tacoma; Eddy Bakeries Company, Inc., 232 S. Front Street, Yakima; Sigman Food Stores, P. O. Box 618, Yakima; and the following officials of Bakers of Washington, Inc.: Miss Maud Pemberton, Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle; Henry Richards, Continental Baking Company, P. O. Box 3227, Seattle; Lloyd C. Mitchell, Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue, North, Seattle; Lou

Blackfield, Bake-Rite Bakery, 1414 14th Avenue, Seattle; Horace Snyder, Snyder's Bakery, Inc., 31 North 4th Street, Yakima; Al Moore, Langendorf United Bakeries, Inc., 2901 6th Avenue, South, Seattle; Ray Reynolds, Grandma Cookie Baking Co., Inc., 3402 Wallingford, Seattle; LeConie Stiles, Jr., Ruth Ashbrook Bakeries Corp., 1407 11th Avenue, Seattle; Henry Gai, Seattle French Baking Co., Inc., 2006 Weller Street, Seattle; Donald R. Due, Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle; and Maurice Vyvey, Baker Boy Bakery, 8050 Bothell Way, Seattle, as officers of Bakers of Washington, Inc.; and respondents Safeway Stores, Inc., and Holsum Baking Company, corporations; and respondents' representatives, agents and employees, directly or through any corporate or other device in or in connection with the offering for sale, sale or distribution of bread, do forthwith cease and desist from:

Entering into, carrying out, continuing or cooperating in any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or members of Bakers of Washington, Inc., or between any one or more of them and others not parties hereto, where any one or more of the parties to such planned common course of action, understanding, agreement, combination or conspiracy is selling bread in interstate commerce in competition with bread sold by any one or more of the other parties thereto, to do or perform any of the following things:

(1) Establish, fix or maintain prices, terms or conditions of sale of bread,

(2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or

(3) Deter or attempt to deter any competitor fro mexercising his individual judgment as to prices, terms or conditions of sale of bread.

IT IS FURTHER ORDERED that the complaint herein be, and the same hereby is, dismissed as to Arthur H. LaLime, deceased.

IT IS FURTHER ORDERED that respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order set forth herein.

By the Commission, Commissioner Anderson concurring in th e result; Commissioner Elman dissenting; and Commissioner Reilly not participating for the reason that he did not hear oral argument.

S—Joseph W. Shea,
Secretary.

ISSUED: February 28, 1964

ATTACHED ARE: (1) Opinion of the Commission by Commissioner Dixon

(2) Dissenting opinion by Commissioner Elman

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

In the Matter of

BAKERS OF WASHINGTON, INC., an incorporated association, its officers, Board of Trustees, employees, representatives and agents, including but not limited to the following:
GEOGRE B. BUCHAN,
RICHARD HOYT,
ARTHUR H. LALIME;
the following named members of respondent association:
BUCHAN BAKING CO.,
CONTINENTAL BAKING COMPANY,
LANGENDORF UNITED BAKERIES, INC.,
HANSEN BAKING CO., INC.,
TRENNERY'S BAKERY CO.,
SNYDER'S BAKERY, INC., corporations.
JOHN M. LARSON, trading as LARSON'S BAKERY,
VIC H. GOETHALS, trading as FORTUNE'S BAKERY,
each individually and as a member of the respondent association and all as representative of all of the members of respondent association;
SAFEWAY STORES, INC. and
HOLSUM BAKING COMPANY, corporations.

Docket No. 8309

OPINION OF THE COMMISSION

By Dixon, Commissioner:

Respondents appeal from the hearing examiner's decision holding that they have fixed bread prices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

Bakers of Washington, Inc., is a corporate trade association organized under the laws of the State of Washington for the purpose of promoting the interests of the baking industry. Its principal office is located in the city of Seattle, and more than half of its 49 members have their places of business there. The other members are located in the surrounding cities and towns of western Washington, particularly in Bellingham, Aberdeen, Tacoma, and Yakima. The association has "divisions" in each of those towns.

The complaint named as respondents the association; its three officials, including its former secretary-manager, Arthur H. LaLime, now deceased; eight of its members as representative of the entire membership; and two other companies, Safeway Stores and Holsum Baking Company.

The examiner found that the wholesale and retail members of this association had attended frequent association meetings at the Athletic Club in downtown Seattle; that, by meetings at the Athletic Club in

downtown Seattle; that, by means of agreements or "understandings" reached at these meetings, price competition in the sale of bread at both the wholesale and retail level had been eliminated or lessened; and that respondent Arthur H. LaLime, then secretary-manager of the association, acting as common agent for the several members, had engaged in various acts of suppressing or lessening price competition among the members of the association.

Respondents take exception to the examiners' decision in four principal particulars. They contend that there has been no price fixing; that, if such price fixing occurred, it did not occur "in" interstate commerce; that, if the association's secretary did in fact cause the suppression of price competition among certain of the association's members, the evidence is insufficient to hold various of the other members legally responsible therefor; and that, in any event, the order is excessively broad.

I.

The members of the association include both "wholesale" and "retail" bakers. As we understand the trade terminology a "wholesale" baker is one that produces (bakes) bread and sells it exclusively to retail establishments (e.g., grocery stores); it does not generally sell directly to consumers. A "retail" baker, on the other hand, is one that performs both the producing

(baking) and retailing functions. The most familiar example is the traditional retail bake shop with its baking plant in the rear of the establishment, and its retail sales counter in the front of the shop. Another is the "in-store" bakery. This includes the grocery store owner who installs, in one section of his store, a baking plant and a bakery products "sales counter," or who permits another party to lease a portion of his store for such an operation. The term "retail" baker also includes the grocer that, instead of installing baking equipment on its *store* premises, sets up a separate baking plant at some other location and then trasports the self-baked bread to its grocery stores for retail sale. Safeway, a respondent here, has such a plant in Seattle. It bakes a "private brand" bread called "Mrs. Wright" and retails it at the various Safeway grocery stores located throughout the western Washington marketing area.

A further aspect of the relationship between the wholesale and retail bakers should be mentioned at the outset .The grocery store that bakes its own bread also handles the major "name brand" breads. For example, Safeway buys "Wonder" bread from Continental and retails it alongside its own self-baked private brand, "Mrs. Wright." Hence Safeway is *both a competitor and a customer of Continental.* The small retail bake shops, those that generally deal exclusively in baked goods, are of course competitors of both

Safeway and Continental — all are striving for the same consumer bread dollars.

It is undisputed that a number of these bakers are not engaged in interstate commerce. Some of them are small bake shops who do no business of any kind outside the city of Seattle. They bake the bread in Seattle, and retail it to consumers in Seattle. Obviously, a price fixing conspiracy exclusively among these bakers to regulate their prices in Seattle would be of no concern to the Federal Trade Commission. On the other hand, if it appears that they have joined in a conspiracy with one or more firms that *are* fixing prices in interstate commerce, then even the most local of these bakers is subject to the federal law. ***Federal Trade Commission v. Cement Institute,*** 333 U.S. 683, 695-696 (1948).

It is also undisputed that several of these respondents are, in fact, "engaged in" interstate commerce. Respondent Continental Baking Company, a Delaware Corporation with principal offices in Rye, New York, the baker of "Wonder" bread, owns and operates more than 70 bakeries in 60 cities located in 29 states and the District of Columbia. It had sales of bread and other bakery products of more than $350 million in 1960, and more than 27,000 employees. Respondent Langendorf United Bakeries, Inc., a Delaware corporation with general offices in San Francisco, Cali-

fornia, owns and operates 11 bakeries in California, Oregon, and Washington. It had 3,896 employees, and sales of more than $73 million in 1961. Safeway Stores, Inc., a Maryland corporation with its principal offices in Oakland, California, operates some 2,000 grocery stores in 28 states and the District of Columbia. In 1960 it had more than 63,500 employees and sales of more than $2,468,000,000. Safeway is one of the three largest retail grocery chains in the United States.

These respondents argue, however, that, while they are "engaged in commerce" and thus subject generally to the jurisdiction of the Federal Trade Commission, the particular "acts" or "practices" challenged in the instant complaint did not themselves occur "in commerce." They contend that counsel supporting the complaint would have met his burden on this point only if he had shown that state lines had been crossed by either (1) the price fixing conspiracy itself, or (2) overt acts committed pursuant to that conspiracy, *i.e.*, sales at the fixed prices. Respondents contend that this record shows neither.

Assuming that a conspiracy has been established, and assuming further, for the sake of argument, that the conspiracy itself is "local" in the eyes of the law, we do not agree that the overt acts committed pursuant to it — the *sales* subsequently made at the fixed prices — were themselves local. First of all, this record

shows that several of these wholesale bakers sell something like 1% or less of the production of their Seattle plants in Alaska. [1]Further, it appears that some Seattle bread is shipped to adjoining states[2] and that a small amount of the bread sold in the Seattle area was in fact baked in another state. [3]While these amounts are not *de minimis*, this case involves a much larger problem. We think it not only important but necessary that we deal with the question of whether these great interstate firms can claim immunity from the statutory prohibition against price fixing in regard to the remaining 99% of the transactions involved, those that took place within the borders of the State of Washingon.

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[1]Langendorf's Seattle plant manager testified that less than 1% of his sales were made to buyers in Alaska. Tr. 313. According to his affidavit, n. 4, *infra*, this amounted to $35,789.50 in 1960. "It is sold FOB Dock right here [Seattle] at our regular wholesale prices." Tr. 344. Continental's Seattle plant manager testified that he sold less than "one-half of one per cent" in Alaska. Tr. 399. Since his plant has annual sales of some $4.5 million, this suggests annual sales from Seattle to Alaska of about $22,500. Buchan, with annual sales of some $4 million, sells "less than a fraction of one per cent" to Alaska buyers. Tr. 230. Hansen makes some shipments to Alaska also. Answer, p. 3.

Interestingly enough, respondents claim even these sales, assuming a Seattle conspiracy, are not actionable under the statute. They say there is no showing that prices charged to Alaska buyers "affect" Seattle prices, or that Seattle sellers are "interested" in Alaska prices. But this assumes the inquiry is directed solely to retail prices. To be sure, the price at which an Alaska buyer *resells* the bread is of no interest to the Seattle conspirators. But we are concerned here with *wholesale* as well as retail prices. And these sales to Alaska purchasers were made FOB the Seattle docks, at the "regular" (*i.e.*, the fixed) wholesale price. Hence they are saels "in" commerce at a price inflated by a conspiratorial agreement.

[2]Safeway (Answer, p. 2), Snyder ships some bread to Oregon (Answer, p. 2).

[3]Holsum ships bread from its Idaho plant to its Trennery subsidiary in Yakima (Answer, pp. 1-2).

Bakery products, including bread, are highly perishable (bread, to be considered acceptably "fresh" must be sold to the ultimate consumer within something like 48 hours after baking). And bakery products are bulky in relation to weight and value, thus making long distance transportation economically impractical. The result is that Continental, for example, instead of baking all its bread in New York and then transporting it into 29 states for sale to local grocery stores, gathers up the men, equipment, and ingredients that it needs, transports them to each of the 29 states, erects a baking plant in each, bakes the product inside the borders of each state, and sells it inside those borders.

The fact that Continental has selected this method of doing business in Seattle is thus due to the nature of bakery products. It appears that, because of the bulk and perishability of bread, something on the order of 150 miles is the maximum distance from the baking plant it can be economically marketed. Here the Seattle marketing area (See Map of Washington, [4]p. 7) runs generally from Seattle to the Canadian border on the north; [5]to the Pacific Ocean on the west;

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[4]Attachment, affidavit of Al Moore, manager of Langendorf's plant in Seattle, filed July 13, 1961. (For a description of the marketing area of Continental's Seattle plant, see attachment, affidavit of Covington plant manager, filed July 10, 1961. The Yakima area is served by another Continental plant, the one located in Portland, Oregon.)

[5]It appears that these respondents do not sell their bread in Canada because of a "duty" Canada imposes.

to Yakima (Washington) to the southeast; and to the Cascade mountain range to the east. None of these market boundaries are more than 150 miles from Seattle. This is the area this trade association has selected for its theater of operations. Within it, respondents' prices are the same. When the retail price of bread goes from 33¢ to 34¢ in Seattle, it also goes up by precisely that amount in Bellingham (about 100 miles to the north, in Tacoma (some 25 miles south of Seattle), in Aberdeen (near the Pacific, roughly 100 miles west of Seattle), and in Yakima (over 100 miels southeast of Seattle). Yet, because this marketing area is well "inland" from the borders of any adjoining state, respondents contend that, if they fix prices in this area, they are beyond the reach of the Federal Trade Commission Act.

Respondents claim support for their position in *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U.S. 349 (1941). There Bunte, a manufacturer of candy, made the candy in Illinois, and sold it in Illinois. The Commission, finding that Bunte was selling its candy in Illinois by means of a "lottery" scheme, and that it therefore enjoyed an unfair advantage over out-of-state competitors who could not lawfully sell their competitive candy across the state line into Illinois by the "lottery" sales method, concluded that Bunte was adversely affecting interstate

commerce and ordered it to cease and desist. The Supreme Court reversed, pointing out that the Federal Trade Commission Act, by its express terms, reaches only unfair acts or practices "in" interstate commerce, and hence des not include those that merely "affect" interstate commerce. The *Bunte* case is not in point here. This complaint alleges that these respondents have fixed prices "in" interstate commerce.

We think the controlling case law here is not to be found in *Bunte,* but in *Federal Trade Commission v. Cement Institute,* 333 U.S. 683, 695-696 (1948), and in *United States v. South-Eastern Underwriters Assn.,* 322 U.S. 533 (1944). In the first of these cases, the Northwestern Portland Cement Company, engaged wholly in intrastate commerce, entered into a planned, common course of action with others who were engaged in interstate commerce. The planned, common coure of action restrained price competition. There the Supreme Court held that "the fact that one or two of the numerous participants in the combination happened to be selling within the borders of a single state is not controlling in determining the scope of the Commission's jurisdiction." In the second of these cases, namely *South-Eastern Underwriters Assn.,* an association of fire insurance companies had been indicted under Section 1 and 2 of the Sherman Act

[6]for fixing fire insurance premium rates (prices) and attempting to monopolize the fire insurance business, in six Southeastern states .The district court, relying upon *Paul v. Virginia,* 8 Wall. 168 (1869), had sustained a demurrer on the ground that insurance simply was not commerce at all, either local or interstate. The Supreme Court reversed.

One of the contentions of the defendant insurance companies (more than half of which maintained their home offices in either New York, Pennsylvania or Connecticut, employing "local" agents to solicit "local," not interstate, contracts. The Court replied:

> But this reason rests upon a distinction between what has been called "local" and what "interstate," a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power. * * * We grant that a contract of insurance, considered as a thing apart from *negotiation* and *execution,* does not itself constitute commerce. * * * But it does not follow from this that the Court is powerless to examine the *entire transaction, of which that contract is but a part,* in order to determine whether there may be a *chain of events which becomes interstate commerce.* Only by treating the Congressional power over commerce among the states as a "technical legal conception" rather than as a "practical one, drawn from the course of business" could such a conclusion be reached. *Swift*

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[6]While Sherman Act cases are not applicable to Federal Trade Commission Act "commerce" problems when the former turned on whether commerce had been "affected" by the acts charged, such cases are of course binding precedent when the issue, as in *South-Eastern Underwriters* was whether those acts occurred "in" interstate commerce.

> *& Co. v. United States,* 196 U.S. 375, 398. In short, a *nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature.* Were the rule otherwise, few businesses could be said to be engaged in interstate commerce. 322 U.S. at 546-547 (emphasis added).

Describing the activties of the defendant insurance companies that were in interstate commerce, the Court said:

> And in great detail the indictment set out these total activities, of which the actual making of contracts was but a part. As recognized by the District Court, the insurance business described in the indictment include *not only the execution* of insurance contracts but also negotiations and events *prior to execution* of the contracts and the innumerable transactions necessary to *performance* of the contracts. All of these alleged transactions, we shall hereafter point out, constituted *a single continuous chain of events,* many of which * * * could possibly have been continued but for that part of them which moved back and forth across state lines. 322 U.S. at 537 (emphasis added).

The so-called "local" parts of these transactions had no separate existence of their own. The feet of each transaction were planted in a single southeastern state, but the whole body stretched across several states to its guiding member — the head — in one of the financial centers of the east, either New York, Pennsylvania, or Connecticut.

> This business is not separated into 48 distinct territorial compartments which function in

> isolation from each other. Interrelationship, interdependence, and integration of activties in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East. 322 U. S. at 541.

A continuous, life-giving stream flowed back and forth between the head of those distant extremities:

> *Premiums collected* from policyholders in every part of the United States flow into these companies for investment. As policies become payable, *checks and drafts* flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of *collections of premiums, payments of policy obligations,* and the *countless documents and communications* wich are essential to the negotiation and execution of policy contracts. *Ibid.* (emphasis added).

The channels and instrumentalities of interstate commerce — telephone, telegraph, mail, and traveling agents — were used to effect the so-called "local" sales.

> Local agents solicited prospects, utilized policy forms sent from home offices, and made regular reports to their companies by mail, telephone or telegraph. Special travelling agents supervised local operati ns. 322 U.S. at 542.

The *terms* on which the "ocal" purhcasers bought, and the value of what they got for their money, were determined not by the "local" salesmen, but by out-of-

state management:

> Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office — the risks it insures, the premiums it charges, the investments it makes, the losses it pays — concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state. 322 U.S. at 541-542.

In the instant case, at least three of the respondents do business in substantially the same manner as those insurance companies. On November 29, 1961, Continental, Langendorf and Safeway entered into written stipulations with counsel supporting the complaint describing the interstate character of their operations. The stipulation with Continental, set out in part in the footnote below,[7] is substantially the

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[7]4. Continental is regularly engaged in interstate commerce in the sale of bread and other bakery products.

5. Membership in Bakers of Washington, Inc. was made in Continental's name and approved at headquarters.

6. Continental assumes legal responsibility for the acts of its plant manager in Seattle as to which testimony was taken.

7. Continental operates on an integrated basis. Ingredients for the products are purchased centrally [from central offices in New York] and receipts from sales go into a single treasury [in New York].

8. Ultimate responsibility for comapny affairs is vested in top management personnel at the company's general offices in Rye, New York.

9. Each element of Continental's bread and bakery product business is part of an integrated whole. The company is a single business entity and benefits or suffers from what is done locally by and through each plant or office.

10. The control over operations which rests in plant managers, beyond that which is peculiar to the position such as the housekeeping functions, is vested in them by delegation from top management.

same as the other two. "Continental operates on an integrated basis. Ingredients for the products are purchased centrally [New York] and receipts from sales go into a single treasury [New York] * * *. Each element of Continental's bread and bakery product business is part of an integrated whole."

The sales involved here are physically made through what are called "driver-salesmen," employees that generally perform both the selling and delivery functions. Each driver-salesman is assigned a specific "delivery route," generally a given number of city blocks. Continental serves 71 delivery routes from its Seattle plant. On those delivery routes, the driver-salesmen make deliveries to those stores that have already agreed to accept their product, and attempt to "sell" those stores that have not yet been persuaded to do so.

There is no suggestion here that these sales have to be "approved" by Continental's New York management. We have no doubt that they are "local" sales in the sense that, in an action for the price of goods sold and delivered, the law of the State of Washington would be controlling. But that is the "type of mechanical criterion" the Supreme Court rejected in *South-Eastern Underwriters*. A purchase-sale transaction under the trade regulation law is considerably more than this. We must, instead, "examine the entire

transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce." Here, as there, the business involved includes not only the execution of the contracts, "but also negotiations and events prior to execution of the contracts and the innumerable transactions necessary to performance of the contracts."

The instant record provides us with very little information as to the "innumerable transactions necessary to performance of the contracts" entered into by these local driver-salesmen on behalf of their out-of-state employers. From the stipulation quoted above, we know that Continental's plant manager in Seattle does not buy the ingredients or raw materials that go into the bread he sells; all purchasing is done for him by a central purchasing office located at the company's headquarters in New York. And from his testimony and certain exhibits we know also that there is a "chain of command" running from his plant in Seattle, Washington, to a "Regional Office" in *California,* and thence to top management in New York.[8] When he wants to increase prices, the plant manager writes to his regional manager in California asking for approval. The regional manager, in turn, gets approval from headquarters in New York. (In fact,

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[8] Tr. 420-427; CX 23A-29.

it appears that the president of Continental personally approved the price increase in 1958[9])

From this "bare bones" record, we see only the broad contours of the taut strings that tie the Seattle plant manager to his out-of-state employer in New York. Fortunately, however, this Commission knows considerably more than this about Continental's over-all operation. On October 27, 1959, we issued our complaint in a proceeding entitled *In the Matter of Continental Baking Company,* Dkt. 7630, charging this same respondent, Continental Baking Company, with violating Sections 2(a) and 2(d) of the amended Clayton Act by granting discriminatory price concessions, and discriminatory promotional allowances, to certain favored customers. On March 8, 1963, the hearing examiner issued his initial decision dismissing the complaint. He found that, while the discriminations had occurred, and while the discriminations in price may have the requisite adverse effects on competition, they were not violative of the statute because they had been granted to meet the equally low prices and equally attractive promotional allowances of competitors. That initial decision was affirmed by this Commission on December 31, 1963.

One of the principal issues involved in that proceeding was similar to the instant problem — namely,

[9]CX 23E.

whether, when one of Continental's "local" plants discriminated in price between two customers located in the same state in which the bread was baked, either of the two "purchases involved in such discrimination" was "in" commerce. Section 2(a) of the Clayton Act, as amended (emphasis added). The hearing examiner held that those purchase-sale transactions *were* "in" commerce.

In reaching this conclusion, the hearing examiner had the benefit of an adjudicatory record that explored the structure and operation of Continental's business with highly commendable thoroughness. Under the principle that a tribunal may take notice of its own records in other cases,[10] we take official notice of the following facts developed in that record through

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[10] "We may notice the record of that case in this court" *National Fire Insurance Co. v. Thompson*, 281 U.S. 331, 336 (1930). See also *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 546, n. 4 (1937) (quoting testiomny from another case); *West Ohio Gas Co.* v. *Public Utilities Comm. (No. 1)*, 294 U.S. 63 (1935) (noticing evidence in record of a companion case *between same parties*); *Crichton* v. *United States*, 56 F. Supp. 876 (S.D.N.Y. 1944), *aff'd.*, 323 U.S. 684 (1945) (ICC noticed record of earlier case involving same party); Davis, 2 *Administrative Law Treatise* 338, 381-384.

As we understand it, the propriety of taking official notice of facts, whether such notice is taken at the beginning of a proceeding or in the agency's decision, turns upon whether the party is afforded an opportunity to challenge the facts so noticed, if it desires, and thus to correct any errors the tribunal may have made. *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 528-530 (1946); Davis, *id.*, at 388, 394, 400, 411; Davis, "On Official Notice," Proceedings of the Federal eHaring Examiners' First Annual Seminar 13, 22 (September 23-25, 1963). Section 7(d) of the Administrative Procedure Act provides: "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." Section 3.25 of our Rules of Practice authorizes the filing of a "petition for reconsideration" of any Commission decision. Should Continental desire to challenge any of these noticed facts,

documentary evidence secured from Continental, and by examination and cross-examination of Continental's officials and employees:

A. *Corporate organization.* Ultimate responsibility for corporate affairs is centered in the company's headquarters in Rye, New York. The headquarters staff is functionally divided into several "divisions," e.g., "purchasing," "sales," etc.

The company's multistate operation is divided into a number of "Regions." Each "regional office" is assigned, by headquarters, a given geographical area, an area that generally includes several states and, of course, several baking plants. The regional office staff, like the headquarters staff, is functionally divided into a number of divisions or departments. Each of these

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it will thus have an opportunity to do so in such a petition for reconsideration, specifying those particular factual statements it wishes to dispute, and setting forth, preferably by affidavits of knowledgeable persons, the true facts in those particulars.

It appears, however, that these noticed facts are undisputed. They were taken from another record involving the same party; they were presented were through the party's own officers, employees, and written records; they were adduced there for the same purpose as here (to show interstate commerce); and cross-examination and opportunity to present rebuttal evidence were afforded. These facts were then found by the examiner and set forth with great particularity in his initial decision in that case (Dkt. 7630, initial decision filed March 8, 1963, particularly pp. 11-21). On its appeal to the Commission, Continental challenged the examiner's legal conclusion that those facts evidenced interstate commerce, but made no effort to dispute any of the factual findings themselves. We could, of course, remand the instant case for the taking of this same evidence a second time. And on a proper showing of the necessity therefor, we would do so. But until such a showing has been made, we are guided by the principle that "the intelligent functioning of the administrative process demands that the Commission [ICC] be not required to indulge in lengthy evidentiary recapitulations of matters just decided in a companion case." *Crichton* v *United States, supra,* 56 F. Supp. at 880.

has a department head that reports to the "regional manager." He has (1) a "Regional Sales Manager," (2) a "Regional Production Supervisor," (3) a "Regional Cost Analyst," (4) a "Regional Vehicular Supervisor," (5) a "Regional Engineer," and (6) a "Regional Personnel Director."[11]

This form of organization is, in effect, repeated at the bakery or plant level. The "plant manager" is responsible to his immediate superior, the "regional" manager. The plant manager has several divisional or departmental heads to assist him. He has: (1) a "Sales Manger," (2) a "Shop Superintendent," (3) an "Office Manager," (4) a "Fleet Superintendent," (5) a "Chief Engineer," and (6) a "Chief Janitor."[12]

B. *Territorial assignments.* New York management controls the geographical territory served by each regional office. It rearranges these sometimes, taking a baking plant (or a distribution "depot") out of one region and putting it under the jurisdiction of another. The regional office, presumably with the approval of the headquarters sales manager, controls the territory to be served by each of the local baking plants. It can have a particular plant manager confine his sales inside the state in which his plant is located,

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[11] *In the Matter of Continental Baking Company,* Dkt. 7630, tr. 712.

[12] *Id.,* at tr. 336.

or it can have him sell across state lines. Local plant managers are assigned, promoted, and transferred from one plant to another, and from one "region" to another.

At the bakery level, the plant manager divides his territory into "delivery routes." Such a route might be 10 blocks long, or only two blocks, depending upon the "density" of the "stops" on that route. (A "stop" is a customer, e.g., a grocery store that buys Continental products.)

C. *Purchasing.* Continental's baking plants in 29 states secure the raw materials or ingredients needed in the baking of their goods by sending a "requisition," apparently through the regional office, to the company's "purchasing division" in Rye, New York. It does this by sending in, each and every week, a "weekly inventory" of the supplies it has on hand. From these, headquarters does the ordering "automatically." The suppliers of the various products needed by Continental's 29-state bakery operations are themselves located in many different state. Upon receipt of an order from Continental's Rye, New York, purchasing division, the suppliers deliver, in many instances across state lines, to whatever baking plant is indicated. Payment for ingredients is of course made by the purchasing division in New York from the central New York treasury.

D. *Production. Continental,* in support of its efforts to maintain "a rigid standard of quality throughout the country," issues "Production Bulletins" prescribing in exact detail the production standards its plants are to follow. The regional production supervisor "is constantly in touch with the plants."[13]

E. *Pricing.* The local plant managers can only "recommend" prices. The regional office, presumably with the approval of the headquarters sales manager, determines prices. To get permission to vary his prices, either generally or to a particular customer, the plant manager submits a request to his regional superior.

F. *Money collected from sales.* Continental's local baking plants have no control whatsoever over the money collected from their sale of Continental products. The bakery has two bank accounts. Money collected from customers is initially deposited in a "general" account, and then periodically transferred to a New York headquarters' bank. For its own local expenses, the bakery is given a "local" account. From this account, it can meet its payroll and make certain other "miscellaneous" expenditures. Except in case of emergencies, the purchasing of the local plant manager is limited to expenditures of $50 or less ($300 for engineering services).[14] For expenditure of more

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[13] *Id.*, at tr. 714-715.

[14] *Id.*, at tr. 526-527, 601-602.

than $50 the plant manager must send a requisition to headquarters. As to the money received from the sale of Continental's products, he is simply a collection agent for the headquarers treasury.

G. *Accounting.* Continental's baking plants follow an accounting system prescribed by the headquarters office in New York. Each week they submit a report that gives the home office in New York a complete breakdown on the past week's production, sales, percentage of "returns," etc. The bakery also submits a weekly "profit and loss" statment. A "Travelling Auditor" audits the bakeries' books twice a year, and may also make additional visits. The regional cost analyst also checks on the bakeries.[15]

H. *Personnel.* Continental's bakery manager can hire and fire employees below the "department head" level. He must have regional "approval" before he can hire, say a "production supervisor," or a "sales supervisor." The regional "personnel director" helps the plant personnel man with such programs as the "student program which we carry out at each plant," that is, recruiting from local colleges. Also, the regional personnel director "is a sort of liaison operator working with the plant personnel man in clearing ideas on safety programs and clearing the distribution of thoughts on hiring, training, et cetera."[16]

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[15] *Id.*, at tr. 716.
[16] *Id.*, at tr. 712-713.

I. *Insurance.* All group life and health insurance, for all Continental employees, is purchased by the "Insurance Department" in Rye, New York.[17]

J. *Engineering.* The regional engineer "irons out the engineering kinks" at the local plants. "He is very important. A plant will develop a new manner of maintenance. He picks it up at one plant and passes it on to the next plant, such as it might help their efficiency and maintenance problems, and so forth."[18]

K. *Vehicles.* The regional "vehicular supervisor" assists the local plants in the maintenance and operation of their truck fleet.

L. *Sales.* The regional manager's responsibilities "are to operate the business and the bakeries under my control and try to make some money. * * * I am responsible for pricing in the trading areas that I have charge of."[19] He is responsible to headquarters for the sales volume of each of his bakeries. "I run sales figures for my region constantly."[20] To assist him, he has a regional "sales manager," whose duties are to: "Call on the bakeries, work with the sales department to develop sales, help them to develop sales campaigns,

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[17] *Id.*, at tr. 719.
[18] *Id.*, at tr. 715-716.
[19] *Id.*, at tr. 1837.
[20] *Id.*, at tr. 1888.

help in getting the right kind of sales people, help to train them, and make store contacts when necessary."[21] "He is in contact with all the plants in my Region. Each plant has some kind of sales activities going on constantly. Various sales promotions, various sales activities and the regional sales manager's job is to go around [to] the plants and confer with the plant manager and insure that these are activities that are going along, and general contact with the activities of each plant, in the direction of sales."[22]

M. *Labor Relations.* Continental has "a Labor Relations man" and "functions for my region and several others * * *. He is the one that negotiates the contracts."[23]

N. *Packaging.* Continental, at its New York headquartes, has an "art department" that designs most of the packages and wrappers in which its bakery products are sold (e.g., "Wonder" bread). However, if a bakery manager feels strongly about a particular design, it won't be forced on him.

O. *Advertising.* In 1961, Continental's bread sales were approximately $187 million. About 6.5% of that total was spent for advertising. Most of this is local or regional, except for some national TV advertising.

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[21] *Id.*, at tr. 1922.

[22] *Id.*, at tr. 714.

[23] *Id.*, at tr. 713-714.

Newspapers, radio, TV, and billboards are the principal media used. National magazines are not used.

Virtually all advertising is *placed* from headquarters in New York, and is *paid for* from New York. The company has its own "Advertising Department" at headquarters. Further, it retains a New York advertising agency to handle its account. Local bakery managers can "suggest" ads they would like to see run in their local areas, but the preparation of the ad copy, the making of the arrangements with the local media (newspapers, radio and TV stations), and the payment of the media's bill are all headquarters' functions.

The home office also prepares "point-of-purchase" advertising material (signs to be put on the grocery store's bread rack, signs for its windows, etc.) for the local bakeries. The home office keeps the plants informed of the material available, and sends it to them from New York on request.

While the local bakery does not prepare, place, or handle the payment for advertising conducted in its trade area, the costs incurred by headquarters are charged to the bakery.[24]

We think the foregoing facts bring Continental's sales in the State of Washington squarely within the

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[24] *Id.*, at tr. 457.

rule of *South-Eastern Underwriters*" that a purchase-sale transaction includes not only the "execution" of the contract "but also negotiations and events prior to execution * * * and the innumerable transactions necessary to performance." Here, the acts by which technical title passes from Continental to its grocery store customers are obviously a small part of Continental's total operation. Its local sales agent can easily agree to deliver on consignment a dozen loaves of "Wonder" bread every Monday, but "innumerable transactions," many of them directly "in" interstate commerce, are "necessary to performance." The work of Continental's driver-salesmen is merely the peak of the iceberg; beneath it, sunk deep into the stream of interstate commerce, is the real body of the transaction.

We find that all of Continental's sales in the State of Washington were "in" interstate commerce. All of them involved a New York seller and a Washington buyer. Each of them was an indivisible part of a host of "transactions * * * [that] constituted a single continuous chain of events, many of which were multistate in character, and none of which, * * * could possibly have been continued but for that part of them which moved back and forth across state lines." *South-Eastern Underwriters, supra,* 322 U.S. at 537.

We think this result is also in full accord with the Court's decision in *Moore v. Mead's Fine Bread Co.,*

348 U.S. 115 (1954),[25] and with the Fifth Circuit's recent opinion in *Shreveport Macaroni Mfg. Co., Inc. v. Federal Trade Commission,* 321 F.2d 404 (1963), *cert. denied,* January 6, 1964. In the latter case it was squarely held that purchase-sale transactions may be "in interstate commerce although the *deliveries* * * * [are] intrastate." 321 F.2d at 407 (emphasis added). Until the Supreme Court resolves whatever conflict may exist between this case and *Willard Dairy Corp. v. National Dairy Products Corp.,* 309 F.2d 943 (6th *Cir.* 1962, cert. denied, 373 U.S. 934 (1963), we feel bound to follow the Court's clear reasoning in *South-Eastern Underwriters, supra,* and our understanding

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[25]In that case, a private treble damage action brought under the Robinson-Patman Price Discrimination Act, the Court found a discrimination "in" commerce where the defendant, operator of a bakery in Clovis, New Mexico, cut its prices inside the State (in Santa Rosa, New Mexico), thereby injuring a local competitor, while keeping its prices high on sales made nine miles across the border in Farwell, Texas. To be sure, the latter sales were enough to meet the technical requirements of the statute. But they were trifling in amount, by any standard. Farwell, Texas, in 1950, had a population of 400. Assuming the defendant had all the bread business in that town, that it received its full wholesale price of 14¢ per loaf, and that every man, woman, and child in town consumed half a loaf of bread per day, the defendant's gross sales there would have been no more than $28 per day. Assuming a net profit of 10% of gross sales, it could not have netted more than $2.80 per day on its Texas sales. (See analysis in Proposed Findings and Conclusions of counsel supporting the complaint, *Continental Baking Co.,* Dkt. 7630, submitted December 31, 1962, p. 59.) The injured New Mexico competitor won a judgment of $68,400. If the Farwell, Texas, sales were the keystone in the Court's decision, then the holding is simply that teh defendant used poor financial judgment in letting its trucks wander nine miles inside the Texas border: it would have had to retain all of the Farwell, Texas, bread business for more than 75 years to earn back that nearly $70,000 sum.

The real basis for the Court's decision, we think, was not that the Mead plant in New Mexico made a few inconsequential sales in a small Texas border town, but the fact that Mead was one of several "interlocked companies," a member of an "interstate combine," 348 U.S. at 119, doing business in many states.

of its opinion in *Moore, supra.* In doing so, we note that nothing in *Willard* suggests that the Court had the benefit there of the kind of intra-corporate data we have discussed here, a study in depth of the vast substratum of out-of-state control exercised over, and the never-ending stream of interstate activities and communications that form the underlying support for, the out-of-state firm's allegedly "local" sales. This is the "economic and business stuff" out of which these transactions are made, *White Motor Co. v. United States,* 372 U.S. 253, 263 (1963), and we think it shows that any other ruling would not only do violence to the purposes of the statute, but would require this Commission to ignore what our careful study here has led us to believe are the economic realities of present day interstate commerce.

II.

Respondents contend that the hearing examiner erred in finding that they had, in fact, conspired to "suppress competition among and between themselves and others in the production, distribution and sale of bread" as charged in the complaint. They call it merely a case of "conscious parallelism." Arguing that nothing has been shown here but price uniformity, they note the principle that: "An inference of conspiracy would only arise from similar business conduct if it appeared more to the interest of competitors

to adopt different practices." *Independent Iron Works, Inc. v. United States Steel Corp.*, 177 F. Supp. 743, 747 (N.D. Cal. 1959), *cert. denied*, November 18, 1963.

Respondents further contend that, whatever inferences of conspiracy might otherwise have been drawn here, they are affirmatively rebutted by several additional facts, namely, (1) that there is no community of interest between the "wholesale" and "retail" members of the association, and thus no reason for them to conspire; (2) that there is no community of interest, and hence no motive for a conspiracy, between those members that are located in different metropolitan areas; and (3) that several of the alleged conspirators said they had lost money during a part of the relevant time period.

The third contention is wholly fallacious. Even if it had been fully established that some of these wholesale bakers had in fact sustained losses,[26] that fact would be insufficient to rebut a reasonable inference of conspiracy. While conspiracy is normally associated with affluence on the part of the conspirators, it is certainly no guarantee of prosperity.

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[26]Those respondents offered no documentary evidence to support the claims on this point. The only written financial data in the record is CX 32, Continental's 1960 Annual Report, which shows a net after tax profit of over $9 million (p. 6); and CX 34, Safeway's 1960 Annual Report, which shows a net profit of over $34 million (p. 18).

Nor is there anything in respondents' "territorial" and "functional" arguments that negate the existence of a price fixing conspiracy here. The latter contention — that "wholesale" and "resale" bakers do not compete with each other — is patently unsound. For example, one of the "retail" bakers, Mr. Vincent Noga, operator of an "in-store" bakery in Yakima, testified that while he was baking and selling his own bread in one section of the Yakima supermarket where he had his baking operation, the various "wholesale" brands (including Continental's "Wonder" bread) were being sold in another section of the same store, under the very same roof. He had no doubt that he was "competing" with the bread baked by the wholesaler.[27] It could not be otherwise. Wholesale and retail prices are tied together by a simple, mathematical formula. On their loaves of bread, the wholesale bakers stamp, for the consumer to see, a "suggested retail price." This is the price the retail grocer almost invariably charges the consumer. The price he pays the wholesale baker is simply that suggested retail price *less 20%*.[28] When the consumer is paying 34¢ for the regular loaf, the grocery store is paying 20% less, or 27.2¢. One of the wholesale bakers, testifying in regard to the 2¢ price increase in 1958, remarked that: "We don't get the two cents. We

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[27]"[T]he wholesalers were my main competitors." Tr. 526.

[28]See, e.g., tr. 42-44, 205; CX 31.

only get a part of that. 20% of it goes to the retailer, the grocer or the restaurant owner * * *."[29]

Hence the big wholesale bakers have a direct and immediate interest in preventing price competition between the retail bakers themselves, and thus between the retail bakers on the one hand and the retail grocery stores (the wholesalers' customers) on the other. For example, one wholesale baker summed up his competition this way: "Well, I was thinking of everybody in the baking industry. You know, our competition isn't just the wholesale baker or the retail baker or the grocery store baker or the house-to-house baker. * * * The *housewife* can bake her own bread. * * * [I]f she thinks the price is too high, she's going to bake in her own kitchen and she says she does a better job."[30]

As to respondents' argument that the geographical distances between these various metropolitan area establishes the absence of competition and hence any motive for fixing prices, it should be noted first that many of these respondents sell in two or more of the towns in question.[31] In fact, it appears that Safe-

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[29]Tr. 182.

[30]Tr. 245 (emphasis added).

[31]Of the 49 members of the association, all of whom are respondents in this proceeding (either named directly or through representative members), more than half of them have their businesses in Seattle itself and thus compete with each other in that city. (CX 8, a list of the members as of date complaint issued, and amount of dues paid by each, tr. 177, lists 29 Seattle members.) The others are located in North Bend, Everett, Kent, Aberdeen, Mount Vernon, Bellingham, Anacortes, Burlington, Tacoma and

way sells in all of them.[32] Therefore, a break in prices in any one of these towns would adversely affect not merely those respondents with baking plants in it, but also those who sell there from baking plants located elsewhere.

Returning to respondents' argument that "conscious parallelism," *i.e.*, uniform prices, does not prove a conspiracy, it should be noted at the outset that this is not a "conscious parallelism" case. It is a conspiracy case. To be sure, the record shows that these respondents have "matched" each other's prices with great diligence.[33] But the evidence here goes substantially beyond that. The record shows (1) that these alleged competitors have held regular "meetings" almost every week, generally every Monday at

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Yakima. All of these towns are well within 150 miles of Seattle, the distance bread can be economically transported from the baking plant. (See Map, p. 7.) Buchan has four plants: two in Seattle, one in Bellingham, and one in Tacoma. Tr. 179. Continental's Seattle plant sells all the way north to the Canadian border, east to North Bend, and south to Renton and Tacoma. Tr. 399-401: For example, it has a delivery route in Anacortes (near Bellingham), tr. 438, and thus competes with local bakers there. Langendorf's Seattle plant similarly sells north to the Canadian line, south to Aberdeen, and southeast all the way over to Yakima. Tr. 312-313. Hansen has two plants, one in Seattle and one in Tacoma. Tr. 288, 294-295. It appears, therefore, that each of the 49 members of this association, regardless of the town in which it sells, is competing with bread baked by one or more of these wholesale bakers.

[32]Safeway "ship[s] all over the State of Washington." Tr. 262.

[33]The hearing examiner's initial decision tabulates, at page 13, the simultaneous and nearly simultaneous price increases by these respondents in the years 1957 (from 30¢ to 31¢ on the standard loaf of bread, 1958 (from 31¢ to 33¢), and 1960 (from 33¢ to 34¢). For example, in 1958, four of the largest — Continental, Langendorf, Hansen, and Buchan — all raised their prices on the standard loaf of bread from 31¢ to 33¢ on precisely the same day, August 11, 1958.

the Athletic Club in Seattle; (2) that they "discussed" prices at those meetings; (3) that, after certain of these meetings, the association's manager informed certain of the members that, on a certain date, there would be an increase in the price of bread; and (4) that the association's manager, as well as his predecessor in that job, repeatedly called on individual members of the association for the purpose of inducing them to refrain from cutting prices, sometimes threatening them with drastic price retaliation if they refused to keep their prices in line with the others.

Only one company was allowed to deviate from those prices — Safeway. While all the other bakers, wholesale and retail, were pressured to retail their bread for the same price Continental got for its "Wonder" bread, Safeway was permitted to sell for 1¢ less. It was permitted to do so for the simple reason that none of the others, not even the big wholesale bakers, had the power to stop it.[34] The result is that respondents have two prices in this market: (1) the high, uniform price (e.g., 34¢ in 1960 for the standard loaf) charged by the group in general — including the advertised brands produced by the big wholesale bakers (Continental's "Wonder" bread,

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[34] Buchan, asked why he didn't meet Safeway's 1¢ lower price, replied: "Well, I am afraid that we are not financially able to undercut Safeway." Tr. 195.

etc.) as well as the unadvertised breads produced by the smallest of the retail bake shops, and (2) the 1¢ lower (33¢) price charged by Safeway for its self-baked, "private brand" bread.

While the association's by-laws provide for "annual" meetings of the entire membership, these are rarely held. Instead, "special" meetings are called frequently. The Seattle division meets almost every week. "At times we have a meeting every week, not always every week."[35] The number of special meetings actually held each year totals less than 52, but more than 26.[36] While the meetings in Seattle are usually held on Mondays, and at the Athletic Club in Seattle, each meeting is individually called. The record contains a list of the "regulars" who have requested that they be notified of all meetings.[37] Members of the association located in the towns served by the other four divisions[38] are not routinely informed of the Seattle meetings, but are free to, and do, attend if they happen to be in town.[39] The man-

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[35]Tr. 36. "Whenever the occasion requires it," a meeting is called. *Ibid.*

[36]Tr. 114.

[37]CX 7, tr. 175.

[38]As noted, the association has five divisions: Seattle; Bellingham (about 100 miles north of Seattle, and about 20 miles south of the Canadian border); Aberdeen (on the Pacific Coast, about 100 miles southwest of Seattle); Yakima (slightly over 100 miles southeast of Seattle); and Tacoma (less than 50 miels south of Seattle).

[39]Tr. 35. The other four divisions have their own meetings. The association's manager, LaLime, apparently called meetings in the divisions whenever those members asked him to. He visited the divisions "[w]henever the

ager of the association (then Arthur LaLime) presided at the meetings.

The ostensible purpose of these meetings is to discuss such matters as contracts with labor unions, labor grievance problems, and regulatory legislative issues. But the testimony of several witnesses who attended these meetings makes it clear that the discussions frequenly involved prices, particularly the alleged "need" of the members to raise their prices in order to recoup the costs of wage increases.

Witness Schafer, former owner of a bakery in Bellingham, testified that, as a member of the association, he occasionally attended its meetings at the Athletic Club when he was in Seattle. "Whenever it was convenient for me to be down here, I would go to their noon luncheon which we considered a luncheon and a meeting combined." He testified further:

> Q. Did you ever hear any discussions of prices or price rises when you were at a meeting of the Bakers of Washington, Inc.?
>
> A. Yes, sir.
>
> Q. What would be the circumstances of such discussions? Would they usually occur around labor contract periods or what?

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occasion requires it. Any time *something hapens* that would require it." Tr. 38 (emphasis added). He estimated that he visited each of the divisions about *10 or 12 times per year*. Tr. 38-39. He presided (as chairman) over all meetings. Tr. 40.

A. That is the reason for raising 'em. * * * Sometimes before and *after* our contract was signed.

Q. Would you hear price discussion at other periods at these meetings or were they generally localized around the contract periods,

A. *Mostly* contract periods, yes.

Q. And what would be the nature of the discussions that you heard?

A. "* * * we're going to use red ink if we don't do something about the bread price."[40]

To the same effect was the testimony of witness Albert Pettersen, formerly bakery supervisor for a local food store chain:

Q. Now, when you were here in Seattle, Mr. Pettersen, did you ever attend any meetings of the Bakers of Washington, Inc., sir?

A. Yes, sir. I attended their Monday luncheon at the Washington Athletic Club.

* * *

Q. [W]e have had testimony to the effect that the price of bread rose in August, August 11, 1958 here in Seattle, the Seattle area. Do you recall attending any meetings at the Washington Athletic Club of the Bakers of Washington, Inc. *in which prices were discussed*, around that period?

A. Yes, I did.

Q. What would be the nature of the price discussion that you heard?

A. Well we discussed the labor, we discussed our price of our material—flour, shortening, sugar.

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[40]Tr. 488-489 (emphasis added), 490.

> And labor had jumpsed so high *that they decided that we should have a raise* in our bread. From there we just took it and they said, "What do you think about certain prices?" and they kicked it around and, so that is as far as it went *as long as I sat there.*[41]

After these meetings were over, the witness was notified by the association's manager, Arthur LaLime, that there was going to be a price increase:

> Q. Did you receive information that prices were going up after this series of meetings?
>
> A. Yes, sir.
>
> Q. And how did you get that information?
>
> A. Well, I believe it was a form sent to us. Now I am not sure whether it was a form or he called me, Art LaLime called me. I don't know whether it was a paper or telephone call.
>
> Q. It was just the one instance when he called you or sent you a notice or was there more than one instance?
>
> A. Well there was more than one instance because we weren't sure on different items to go up on, like buns and specialty breads.[42]

The explanation offered by respondents for the remarkable coordination of their price increases is that the whole thing is a matter of "price leadership." First, they say, one of the respondents, acting independently of his competitors, decides to raise his prices. Because certain of the very large grocery

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[41]Tr. 259-260 (emphasis added).

[42]Tr. 261.

chains insist on it, a *written* notice of all price changes is sent to them by the price leader several days in *advance of the effective date* of the change. His competitors, through salesmen calling on the notified chains, learn almost immediately (perhaps the same day the notice was received) that the price leader will increase his prices on a certain date in the future. These competitors, equally eager to increase their own prices (respondents contend), immediately send out similar notices to the chains. For example, four of the principal respondents — Continental, Langendorf, Buchan, Hansen — all picked August 11, 1958, for the *effective* date of their 1958 price increase. On August 7, 1958 — four days previous — Continental had sent A & P a written announcement that, effective August 11, 1958, the price of the standard loaf of bread would increase from 31¢ to 33¢ (and similarly on other bread items.[43] The *next day* — August 8, 1958 — two of Continental's competitors, Langendorf and Hansen, sent similar announcements to A & P and their other large chain customers.[44] Their announcements, like that of Continental, stated that, effective August 11, 1958, the price would go up from 3¢1 to 33¢. Had these three and all of their competitors made their announcements on the same date,

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[43]CX 21; tr. 402-403. (These are suggested retail prices; the wholesale price to the grocer is 20% less.)

[44]CX 15; tr. 320. CX 13; tr. 297-298.

say, August 7, it would have been hard to explain; the only inference would have been that each had agreed with the others to go up on that day. But where the first move is made by only one company, the others can claim they subsequently and "independently" learned of that competitor's "independent" announcement the day before, and thus that the moves of all amount to nothing but "meeting competition."[45]

But some of the baker witnesses testified that they learned of their competitors' impending price increases not from the "trade" (grocery chain buyers) but from the *manager of the association.* For example, witness Albert Pettersen was quite clear that, although his employer, Albertsons Stores, was not only a baker of bread but a purchaser of it,[46] it did not receive written notices of price increases from its suppliers, but, instead, from the association.[47]

This was not the only baker witness that testified to the receipt of such advance price information from the association. Mr. Frank A. Maxeiner, Jr., former proprietor of Model Electric Bakery in Seattle, tes-

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[45]See, e.g., CX 23B, tr. 417, where Continental reported that it was *raising* its prices "in order to meet the competitive situation * * *."

[46]Albertsons bakes its own private brand bread and sells it in its own grocery stores. In addition, however, its stores carry the various "brand name" beads, e.g., Continental's "Wonder" bread. Hence Albertsons is both a customer and a competitor of Continental.

[47]Tr. 265-267.

tified as follows:

> Q. Now, during the time Mr. Alford was associated with Bakers of Washington, did he ever contact you with respect to impending price rises as to bread?
>
> A. Yes, he called on the phone.
>
> Q. And did this happen on several occasions?
>
> A. Yes, it did *over the years.*
>
> Q. Did he advise you as to an impending price rise in bread when he called?
>
> Y. Yes, he would usually indicate that *we were to advance the price of bread.*[48]

In the face of such testimony, we are not "obliged to accept as true" the denials of the respondents. *Girardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F.2d 196, 202 (9th Cir. 1963). Moreover, even some of the larger respondents virtually admitted they discussed prices at their Seattle meetings and knew in advance of their competitors' impending price increases. George Buchan, president of one of the larger respondents, testified as follows:

> Q. Were there any other discussions at the Bakers of Washington, Inc. in connection with the discussions on labor *regarding prices?*
>
> A. Oh, I imagine during the negotiations there were. * * *
>
> Q. Did you discuss then what the added costs would be of the added labor payments?

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[48]Tr. 282 (emphasis added).

A. Oh, yes.[49]

On the question of advance knowledge of competitors' price increases, the major respondents repeatedly emphasized that they had merely heard "rumors" of what their competitors were going to do.[50] But much of this testimony had a decidedly equivocal note to it. For example, a Mr. Covington, Continental's bread plant manager in Seattle, testified as follows concerning the 1960 price increases:

> Q. Do you know in advance one way or another when a competitor is going to raise his prices?
>
> A. We have some knowledge of it, yes, sir.
>
> * * *
>
> Q. * * * Do you learn of prospective increases, that is, do you learn in *advance* of the *announcement* of an increase that a competitor is going to make that increase?
>
> A. Not *too far* in advance, no sir.
>
> Q. Do you only learn after some announcement has been made? Which is it?
>
> A. I only know *for sure* after some announcement has been made.[51]

Representatives of the larger respondents were something less than persuasive when interrogated about how they happened to have picked a particular date to raise prices and about the reasons for de-

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[49]Tr. 189-190 (emphasis added).

[50]See, e.g., tr. 186, 189, 237, 244, 247, 321-322, 335, 412, 443, 449.

[51]Tr. 412-413 (emphasis added).

ciding to raise the price by the particular amount chosen. Thus, the 1957 increase had been a 1¢ raise, the 1958 increase had been a 2¢ hike, and the 1960 jump was for only 1¢ again. Why pick 2¢ one year, and 1¢ another? "Well, I just didn't feel that I could get any more than one cent."[52] But this doesn't explain why he "felt" he could get 2¢ in 1958. In other words, there were no "false starts" here. Each time a "price leader" raised his prices, it "stuck." The others followed him up quickly; the price leader did not first try 2¢, and then have to "back down" to 1¢. The figure he selected — whether 1¢ or 2¢ — was always just the amount that his major competitors, also exercising their "independent" business judgment, agreed was neither too large nor too small for the state of the market.

As to the *dates* selected for the increases, e.g., August 11, 1958, rather than, say a week earlier or a week later, Mr. Moore, manager of Langendorf's Seattle plant, testified as follows:

> Q. Why didn't you do it the *previous* Monday because you were already paying the [increased] labor wages?
>
> A. I can't answer that right now because I can't think why.[53]

Arthur LaLime, then manager of the association,

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[52]Tr. 303.

[53]Tr. 321-322 (emphasis added).

came to the job in November of 1957. He succeeded a Mr. Alford, who had held the post for more than 20 years, until his death in June of 1957. This predecessor had been regarded by the members as the price "bellweather." Witness Harry Schafer, a baker in Seattle until 1956, testified as follows:

> Q. Was there someone looked to in those meetings to be the bellweather for prices?
>
> A. Well, usually the head of the bureau * * *. At that time it was Mr. Alford.[54]

Mr. Maxeiner, as noted, testified that Alford had made it a practice, "over the years," to instruct him by telephone when prices were about to be raised: "Yes, he would usually indicate that we were to advance the price of bread."[55]

Victor Goethals, proprietor of a small bakery in the Anacortes-Bellingham area, testified that Alford had threatened him with a "price war" in 1957 "if I do not put it [prices] up with the rest of the bakers."[56] The witness was similarly threatened the fol-

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[54]Tr. 491.

[55]Tr. 282.

[56]Tr. 50. "Alford who was in charge of the [association] had called me and told me to put my price up. I did not do it for quite a while until I had several calls and then he threatened me to – there might be a price was if I do not put it up with the rest of the bakers." Tr. 50. (It apears, however, that the witness was mistaken in attributing this particular incident to Alford. Since Alford had died on June 13, 1957, and since the incident would have logically followed the price increase of July 22, 1957, some five weeks after Alford's death, this threat was probably made either by the "interim" association manager, one Gene Crawford, or by his successor, LaLime, who took the office in November.)

lowing year. "In 1958 I went up because I was almost — well, I was told to go up" by LaLime. "He said I should put the price of bread up with the rest of the wholesalers."[57] This increase was followed because "I didn't want the same trouble I had before, that I had in 1957."[58] Asked what kind of pressure could be put on him, the witness replied: "Well, they can * * * undersell me and break me at any time."[59]

In 1960, however, the witness simply refused to go up again. "I just felt I couldn't afford to go up because you lose too much business by keep raising and raising the prices."[60]

Another witness, Mr. Bennett Haggen, proprietor of a supermarket ("in-store") bakery in Bellingham, testified that LaLime visited his place of business in the fall of 1957 to discuss the fact that three local bakers were cutting prices. It was a substantial visit. "One hour, two hours, I didn't have too much to do."[61]

Q. What occurred at this meeting between yourself and Mr. LaLime?

A. Well, I believe that Mr. LaLime was just new in the territory then and, of course, he came

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[57]Tr. 51.

[58]Tr. 54.

[59]Tr. 55.

[60]Tr. 51.

[61]Tr. 374.

and introduced himself and then because of the situation, we discussed the bread deal.[62]

The witness did not know whether LaLime had actually visited the three price-cutters in 1957, but he knew that, two weeks after LaLime's trip to Bellingham, the "price war" ended.[63]

In 1958, prior to the price raise of August 11, mentioned above, LaLime invited another witness, Mr. Robert Hall, proprietor of a small Bellingham bakery, to attend a meeting of the local bakers. The witness testified as follows:

Q. And in the summer of 1958, was a meeting of bakers held in Bellingham?

A. Yes, sir.

* * *

Q. By whom were you invited to attend?

A. *The representative for the Bakers of Washington.*

* * *

Q. And can you tell us what transpired at that meeting?

A. Discussion of prevailing prices, and the bread rise that was *about to take place* and—

Q. Was there any discussion of what Hall's Bakery intended to do with its price conduct?

A. Yes. Hall's Bakery had been known as a cut-rate bakery and they would like to have us join and follow on line with the rest of the bakeries.

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[62]Tr. 357.

[63]Tr. 366.

Q. And did you refuse to do that?

A. I told them that we still had Hall's Bakery name on our place of business and we were maintaining our own place of business.

* * *

Q. Did Mr. LaLime ever tell you to get your prices up?

A. Mr. LaLime told me that, for instance, if Wonder Bakery [Continental] cared to bring up bread in Bellingham and sell it as an unbranded loaf of bread for 10 cents a loaf, what would that do for your business? * * * He did not say they were going to, he said: "What if they did?"[64]

Mr. Albert Pettersen, former bakery supervisor for the Albertson grocery chain, testified that LaLime, the association's manager, had threatened him with a "bread war" unless he stopped advertising his bread at a cut price. In 1959, the "regular price" of raisin bread had been 26¢ per loaf. The witness ran an ad in a Seattle paper on August 3, 1959,[65] offering it for sale at 19¢. Asked if the ad caused any "repercussions," the witness said: "Well, the Association called me and told me that I shouldn't run raisin bread at 10 cents. * * * Well, he thought maybe we might have a bread war if I keep fooling around with the price of bread."[66]

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[64]Tr. 466-468 (emphasis added).

[65]CX 12, tr. 250.

[66]Tr. 255-257, 273.

The smaller bakers in other areas testified to efforts of competitors and the association's manager to persuade them to raise their prices. Mr. Ralph Hall, brother and partner of Robert Hall, mentioned above, testified that "it was suggested by Mr. LaLime on two different occasions that he thought we could get more for our bread and more in line with what the other fellows were getting. However, we ignored all his suggestions and in fact told him that we would not raise the price."[67] One of those occasions was in 1959. "Well, in this regard, he was up there — the last time in 1959 he was there and he asked us — when this last bread war was going on, he asked the reasons. He came in one day and he asked me all about this price that we had on the window and asked us who had started this thing and all * * *. Well * * * he asked me to do these things, I mean, he was asking me about them and, of course, the only thing that I can go on, he was the representative for the Washington State Bakers Association and I had a talk with him and that's what he was there about * * *. As my memory of the conversation goes he said to me: 'There are several of the other stores now that are getting 32 cents a loaf and we are wondering if you couldn't come up at least to meet those fellows at 32 cents.'"[68]

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[67] Tr. 477-478.

[68] Tr. 481-482.

LaLime wasn't the only one that tried to persuade Hall to raise his prices: "Now, in the spring, I believe, of 1959 I had a phone call that there was a bread war going on at the time and a fellow that represented himself, he said he was a Safeway store man, he never gave me any name on the phone, but he said he thought we'd *better get the price of bread up there.* And that was the only thing that's ever been said by anybody from the Safeway store. * * * No, in no way would I know except that he told me that he was a Safeway stare man and that the price should be brought up there or else we would probably get in a bread war with them."[69]

This occurred, as noted, in Bellingham, some 100 miles north of Seattle. Two years earlier, in 1957, another such incident occurred in Yakima, over 200 miles away. Mr. Wayne Atkinson, owner of a small bakery in Yakima, testified that he had run an advertisement featuring a price cut from 31¢ (the price his competitors were then charging) to 21¢. The ad ran on a Thursday night, and he sold at the low price on Friday and Saturday. On Monday morning, he was called on by Jim and Bud Snyder, owners of a competing bakery. They told him they had received a telephone call from Seattle:

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[69]Tr. 478-479.

Q. Whom did the Snyders say had called them from Seattle, did they say?

A. Yes, sir. * * * Safeway.

* * *

Q. Mr. Atkinson, what happened with regard to your prices, what did you do about them following this conversation with the Snyders?

A. I went back to the original price.[70]

We conclude that, while some of the respondents may have thought these repeated price increases were in their "own economic interest," others did not feel that way and would not have raised their prices had it not been for the urgings, and sometimes the threats, of the association's manager and certain of their competitors. We think it clear that there was an actual agreement, understanding, or "meeting of the minds" here between some of the larger, more powerful of these respondents, and that the weaker members acquiesced in the agreement as a result of the promptings and pressures put on them by the former.

III.

Respondents argue further that, even if the association's managers had in fact suppressed competition

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[70]Tr. 381-383. Before he went back, however, "we had a meeting that was called. I believe it was the following Thursday or within a few days of when I had been called." The meeting was held at the Chinook Hotel, in Yakima. The witness attended, along with "nearly all bakeries in the city of Yakima, including retail and wholesale." Tr. 383. "Well, there were several things that were talked about, mostly coordinating the prices a little bit. * * * [T]hey all more or less *agreed* that we would not shoot [cut] prices on large white and large whole wheat, a pound and a half loaves, we wouldn't shoot the prices on those." Tr. 383, 385-387 (empasis added).

among the Washington bakers, the evidence is insufficient to "connect" the various individual members of the association with that official's unlawful acts. They argue that they hired him to handle their labor relations with the various labor unions; that labor negotiations were "all he was good for;" that he was given no authority to fix prices; that, in fact, he was expressly enjoined from doing so; that, if he did in fact fix prices, the individual members of the association neither knew nor should have known of it; and that, therefore, they cannot be held responsible for it.

The record, however, is otherwise, First of all, Mr. LaLime, the man they employed to run their association, had a deep personal conviction — a working "philosophy" — that was wholly opposed to the national policy in favor of competition. He was against it, and made no bones about it. He described his "philosophy" in these words:

> A. No. I am not approached with the price situation. However, I vehemently recommend no price wars because it is economic waste and very devastating to the industry.
>
> Q. How do you do that? How do you convey that recommendation?
>
> A. *By every persuasion that I am capable of stating.*
>
> Q. In the opening meeting you use that pilosophy, do you?

A. No, *I don't recall* of open meeting discussions on that basis. No, sir.

Q. Then how do you convey your philosophy *to the membership?*

A. *By personal contact.*

Q. What is it you say to them?

A. I tell that a price war would be very devastating to the industry. The demands that we have from labor are extremely difficult to live with without having a sick industry on top of it.[71]

Respondents contend they knew nothing of Mr. LaLime's proselytizing on behalf of his "philosophy" of noncompetition. They would have us believe that they were completely unaware of his many phone calls and visits to those members that cut prices, and those that were slow to recognize their "economic interest" in raising their prices. They tell us they hired him to take care of labor problems; if he fixed prices, he was strictly on a lark of his own.

We find, as noted above, that prices were discussed at the weekly meetings of the association at the Athletic Club in Seattle, and at meeting held in Bellingham and Yakima. This record establishes that at

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[71]Tr. 41 (emphasis added). Mr. LaLime elaborated upon this "philosophy" of his in describing the calls he made on members who attempted to cut prices: "I did all in my power to persuade these people not to do so." Tr. 42. "I asked him not to perpetuate a price war, not to become involved in one." Tr. 44. "I pointed out that a price war was very uneconomical, that it would be disastrous to the industry and it would be particularly disastrous especially to a smaller operation, that any time these price wars started there was only one thing that happened and that was complete chaos." Tr. 46.

least 14 of the 49 members of the association were *regularly* in attendance at the Seattle meetings, including Safeway and the larger wholesale respondents in this proceeding, e.g., Continental, Langendorf, Buchan, and Hansen.[72] It has also been shown by the testimony that the group was small enough, and the physical setting was arranged in such a manner, that every person present at those meetings was able to see and hear everything that was done or said. Mr. LaLime presided over these meetings. The smaller members of the association did not understand that labor matters were "all he was good for." They thought the purpose of the organization he represented was "to make better labor relations, *to maintain prices,* and generally better baking conditions."[73] They thought he association's manager was the industry's "bellweather" on prices.[74] They thought he was the one to call when a competitor got out of line on prices.[75] When he appeared in Bellingham for the stated purpose of stopping the local price cutting, they thought he was there as a representative of he association; they couldn't say he was up there on his own, no."[76] They took him seriously when he told them

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[72]CX 7, tr. 81-94, 175.

[73]Tr. 464 (emphasis added). Mr. LaLime himself had said this to the witness, Mr. Robert Hall of Bellingham. Tr. 464.

[74]Tr. 491.

[75]Tr. 258-259.

[76]Tr. 480.

he "thought maybe we might have a bread war if I keep fooling around with the price of bread."[77] When they received a written notice that, on a certain date, all the bakers were to raise their prices, they knew it had to have come from him. "[T]hey [the association officials] would be the only logical ones to send us out the price. * * * Well, it was from him. It couldn't be from anybody else but him."[78] When he appeared at a member's place of business, the member knew he was there as the spokesman for the association: "He didn't have to tell me. I know he is."[79] He was not on a lark of his own: "How can he represent himself when he is working for the association?"[80] And he did not represent merely the wholesale bakers, or just the retailers: "Well, sure he represents the wholesale people and the retail peopl."[81] When he told a retail baker to raise his prices up to the level of his competitors' prices, the baker thought he spoke for the association: "I thought that was his job."[82] When he intimated to a small baker that Continental might be called in to crush him by selling bread at his front door for 10¢ a loaf, that baker "figured he [LaLime] was speaking for the bakers' association of Washington."[83]

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[77]Tr. 257.
[78]Tr. 265.
[79]Tr. 270.
[80]Tr. 276.
[81]Tr. 275.
[82]Tr. 62.
[83]Tr. 469-470.

The association, therefore, and the activities of the man they jointly put in charge of it, is the cement that binds the members together here. We find as a fact that each member of this association either knew or should have known that LaLime actively discouraged and suppressed price competition throughout the area in which it operates, and that they either affirmatively approved of those activities or acquiesced in them. All knew or should have known of the activities of the association and of its manager, and all adhered to the fixed prices the manager announced and policed.[84] It is elementary that a conspiracy creates an agency relationship among its members; every act performed by any member of the conspiracy in furtherance of its purposes is, in law, the act of all members of the conspiracy.[85] Proof of participation in meetings at which prices have been "discussed" is "sufficient to provide a foundation for the introduction of evidence of other acts on the part of one conspirator, in furtherance of the conspiracy, binding on

[84]Respondents enjoyed almost complete success in bringing price cutters into line. An exception was Mr. Vincent Noga, owner of a small in-store bakery in a Yakima suburb, who resisted the threats and sold beneath his competitors' prices for over a year (increasing his sales volume from approximately 40 to 150 loaves per day, and his profits from about $9 to $30 per day) until he lost his lease. Tr. 517, 523-525. Bread prices throughout the area are "quite standard." Tr. 185. Asked if "the small retail baker" stayed at his own price level, Buchan, a wholesaler, replied: "Very much so." Tr. 197. See also tr. 514.

[85]"[W]hen any number of persons associate themselves together in the prosecution of a comomn plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them." *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U.S. 229, 249 (1917).

all. *American Tobacco Co. v. United States,* 147 F.2d 93, 118 (C.A. 6, 1944)." *Continental Baking Co. v. United States,* 281 F.2d 137, 152 (6th Cir. 1960). Here, the principal respondents, including Continental, Langendorf, and Safeway, all participated in the Seattle price discussion meetings. Continental's Seattle plant manager testified that he not only attended those meetings generally, but that he had attended them "around September of 1960,"[86] the month in which Continental and its major competitors simultaneously raised their prices from 33¢ to 34¢. Langendorf's Seattle bread plant manager testified that "I attend meetings quite often, yes."[87] He was the witness that, when asked why he had elected to raise his prices on August 11, 1958 (the date on which his major competitors raised their prices), rather than a week earlier or a week later, replied: "I can't answer that right now because I can't think why."[88] Jens Hansen, president of Hansen Baking Company, testified that "Well, I have always been quite regular [in attending the Seattle meetings] but I haven't of late; last year or so I have been off and on."[89] He was quite regular in 1958; in fact, of the 26 or more meetings held by the association in that year, "I attended a good proportion of them."[90] George Buchan,

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[86]Tr. 414.
[87]Tr. 315.
[88]Tr. 322.
[89]Tr. 294.
[90]Tr. 304.

president of Buchan Baking Company, testified that he regularly attended the association's Seattle meetings, and that he "imagined" prices were "discussed."[91] Other witnesses testified to seeing representatives of these and other companies at the Seattle meetings.[92]

And of course Safeway was represented at those meetings. Safeway was not a "member" of the association. It was not carried on the rolls and did not pay dues. But it nonetheless managed to secure all the benefits of membership by "retaining," on an

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[91]Tr. 189-190.

[92]See, e.g., testimony of Harry Schafer, of Schafer's Bakery, who saw Jim Hansen, eGorge Bucan, Mr. Richards (of Continental), and Al Moore (of aLngendorf), at the meetings, tr. 496, together with numerous other wholesale and retail bankers. (The number attending varied from perhaps 10 to 25. Tr. 493, 495.)

The association's manager, LaLime, submitted a list (CX 7) of the "regulars" who had left standing instructions that they be notified of all meetings (tr. 87, 94, 175). There are fourteen of these regulars, including Continental, Langendorf, Buchan (represented by respondent George B. Buchan), and Hansen (represented by respondent Dick Hoyt).

The association's manager also testified to the attendance at the meetings of representatives of *Safeway*, Continental, Langendorf, Hansen (represented by its president, Jens aHnsen, or Richard Hoyt, who is also vice president of the association) (tr. 81, 176), and Buchan (president of the association) (tr. 81). Witness Wayne Atkinson, former owner of the Old Holland Bakery in Yakima, identified Jim and Bud Snyder, owners of respondent Snyder's Bakery, in aYkima, as competitors who had pressured him to raise his prices (tr. 379). He also testified to a meeting at the Chinook Hotel, in Yakima, attended "by nearly all bakeries in the city of Yakima, including retail and wholesale" (tr. 383), at which "they all more or less agreed that we would not shoot [cut] prices on large white and large whole wheat * * *." Tr. 386. The witness specifically noted the presence at that meeting of the Snyders, Dick Trenerry (of respondent Trenerry's Bakery, a wholly-owned subsidiary of respondent Holsum Baking Co.), and Jack Larson (tr. 384). Respondent Victor H. Goethals, proprietor of Fortune's Bakery in Anacortes (near Bellingham), testified to following, although apparently "unwillingly," *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 719 (1948), the association's instructions to raise prices (tr. 50-62).

annual "fee" basis, the association's manager to handle its labor negotiations. Safeway paid LaLime, as it had his predecessor, Alford, a "retainer" of $600 per year.[93] In addition, however, Safeway's representatives attended the Seattle meetings at the Athletic Club:

> Q. Does a representative of the Safeway organization attend meetings of the Baker of Washington, Inc.?
>
> A. Their labor relations man would on occasion during contract negotiations.
>
> Q. What about their *divisional bread man?*
>
> A. He would attend meetings.
>
> Q. He does regularly attend meetings?
>
> A. *Usually, not always.*[94]

As noted, Safeway has its own baking plant in Seattle, producing its "private brand" bread called "Mrs. Wright." It sells this bread in its various retail stores located, apparently, "all over the State of Washington."[95] In addition, Safeway's retail stores handle the "name brand" breads produced by the wholesale bakers. It thus has two prices: first, the full, "suggested" retail price for the wholesalers' bread (e.g., 34¢ for "Wonder" bread); and, second, 1¢ less (33¢) for its own self-baked brand, "Mrs. Wright."

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[93]Tr. 32.

[94]Tr. 80 (emphasis added). See also tr. 81-82.

[95]Tr. 262.

In fact, Safeway is the local bread industry's club over the smaller bakers. Witness Wayne Atkinson, proprietor of a small bakery in Yakima, testified that when he cut his price, a local competitor, a Mr. Snyder, immediately showed up at his place of business to tell him Safeway had called about his price:

> Q. Whom did the Snyders say had called them from Seattle, did they say?
>
> A. Yes, sir.
>
> Q. And who was it?
>
> A. Safeway.[96]

Another price cutter testified that he had personally received a threatning phone call from Safeway: "Now, in the spring, I believe, of 1959 I had a phone call that there was a bread war going on at the time and a fellow that represented himself, he said he was a Safeway store man, he never gave me any name on the phone, but *he said he thought we'd better get the price of bread up there.* And that was the only thing that's ever been said by anybody from the Safeway store. * * * No, in no way would I know except that he told me that he was a Safeway store man and that the price should be brought up there *or else we would probably get in a bread war with them.*"[97]

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[96]Tr. 381-382A.

[97]Tr. 478-479 (emphasis added).

As to the remaining respondents, it is true of course that "mere membership" in the association is not enough to warrant an order against them. *Phelps Dodge Refining Corp. v. Federal Trade Commission,* 139 F.2d 393, 396 (2d Cir. 1943). Here, however, many of these respondents were shown to have either attended meetings where prices were discussed, either in Seattle or in one of the divisions, or to have actively attempted to influence the prices of competitors.[98] And they generally adhered to the prices fixed at those meetings.[99] But certainly all of them knew or should have known of the price fixing activities of the association's manager, LaLime. He was outspoken in his hostility to price competition, openly spreading his "philosophy" to the members by "personal contact." (Each of the "divisions" was visited by LaLime from 10 to 12 times per year.[100]) His threats, and those of Safeway and the other powerful bakers, could hardly have failed to come to the attention of these respondents, and thus to have put them on notice of the fact that the associtaion was engaged in unlawful pricing activities.[101]

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[98]See n. 92, *supra.*

[99]See n. 84, *supra.*

[100]Tr. 39.

[101]"Thus the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is charge-

IV.

Finally, respondents contend that the order entered by the hearing examiner is improperly broad — that it should be limited to the precise geographical area in which the price fixing has been found (State of Washington), rather than extending to wherever each of the respondents do business; and that, in enjoining them from continuing to fix prices in the future, it should not prohibit them from fixing prices generally, but only from achieving that result by the precise means involved here, i.e., through this particular *trade association,* Bakers of Washington, Inc.

The latter contention borders on the frivolous. While the Commission must tailor its order to the particular "practice" found to have existed, "price fixing" is a single, well-defined "practice." Respondents, in contending for an order that merely prohibits price fixing *through the instrumentality* of Bakers of Washington, Inc., misconceives the distinction between a generic "practice" and the several *techniques* of effecting it. For example, an order so limited would leave these respondents free to resume their conspiracy tomorrow, holding conspiratorial meetings at high noon in the most public place in the

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able with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put." *Phelps Dodge supra,* 139 F.2d at 396-397.

city of Seattle, so long as they kept the association, Bakers of Washington, out of the matter. Such an order would be no more effective than one limited to a prohibition of price fixing only where it was accomplished by meetings held at a particular place, e.g., at the Athletic Club in Seattle. The order could be avoided by using the telephone instead of having a meeting, or by moving the site of the meeting from the Athletic Club to other premises. In *Cement Institute v. Federal Trade Commission,* 333 U.S. 683 (1948), the respondents objected to the fact that the order not only prohibited price fixing by means of the "basing-point system," but also by selling "pursuant to or in accordance with *any other plan or system* which results in identical price quotations or prices for cement * * *." The Court said: "The paragraph is merely designed to forbid respondents from acting in harmony to bring about national uniformity in whatever fashion they may seek by collective action to achieve that result. We think that no one would find ambiguity in this language who concluded in good faith to abandon the old practices." 333 U.S. at 729.

Respondents' suggested "territorial" limitation of the order is equally unsound. The general rule is that a violation of law, whether practiced in one area or in many warrants an order covering the whole of the violator's business. There being no reason to suppose that an entity showing no reluctance to fix prices in

Seattle, Washington, would act differently in another city or another state, the public interest in the cessation of such unlawful conduct requires an order that protects the public in all of the states, not merely in Washington.[102]

Finally, respondents profess the fear that the order, as drafted, might be so construed as to prohibit such lawful business practices as marking their loaves of bread at the baking plant with suggested retail prices, especially since they make "accommodation" sales to each other. The language that bothers them here is that part of the preamble that prohibits conspiracies and collusive understandings between any two or more members of the association "or between any one or more of them and others not parties hereto," to fix prices, adhere to such fixed prices, or deter any competitor from exercising his own independent judgment in pricing his goods. The prohibition of future price fixing conspiracies between one or more of the respondents "and others not parties hereto" is a routine provision, one that has been expressly sanctioned by the Supreme Court. For example, in *Cement Institute v. Federal Trade Commission, supra,* the order

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[102]"As to territorial extent, the company, having been found guilty of a flagrant violation of the act, was properly required to cease and desist from such practices in all areas in which it was doing business." *Maryland Baking Co.* v. *Federal Trade Commission,* 243 F.2d 716, 718 (1957). See also *Foremost Dairies, Inc.,* Dkt. 7475 (1963), holding that an order was properly extended to the respondent's operations throughout the country, rather than being limited to Albuquerque, New Mexico, the city where the violation was found to have occurred.

approved by the Court prohibited future conspiracies not only between the parties themselves but "between any one or more of said respondents and others not parties hereto * * *." The Court, noting that the conspirators had secured the aid of others in the past, and that the entry of new members in the industry in the future could be reasonably anticipated, declared that "the Commission was authorized to make its order broad enough effectively to restrain respondents from combining with others as well as among themselves." *Id.*, at 728-729.

The instant order, which is substantially the same as the order approved in *Cement Institute, supra,* could not conceivably be construed to prohibit the common practice of placing "suggested" retail prices on bread wrappers. The line between the "suggesting" of prices and the "fixing" of prices is so well settled as to require no discussion. Respondents are simply being required to leave their competitors alone — to stop agreeing with them, and stop interfering with them — in the pricing of bread. Selling them bread that happens to bear a suggested retail price constitutes neither agreement nor interference. As the court said in *Federal Trade Commission v. National Lead Co.,* 352 U.S. 419, 431 (1957): "Respondents pose hypothetical situations which they say may rise up to plague them. However, 'we think it would not be good judicial administration' * * * to strike the con-

tested paragraph of the order to meet such conjectures. The Commission has reserved jurisdiction to meet just such contingenies. As actual situations arise they can be presented to the Commission in evidentiary form rather than as fantasies." Moreover, under the Commission's present rules of practice, provision is expressly made for those bound by an order to secure advice from the Commission as to whether a proposed course of action would be in compliance therewith. Rules Sec. 3.26(b), (c), 28 Fed. Reg. 7080, 7091 (July 11, 1963). See also *Regina Corp. v. Federal Trade Commission,* 322 F.2d 765 (3d Cir. 1963); *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission,* 311 F.2d 480, 488 (2d Cir. 1962).

We think the order should be modified in one particular, however. As issued by the examiner, it prohibits any two of these respondents, or any one of them and any other person, from collusively engaging in the described price fixing activities, without regard to whether any of those activities occur in interstate commerce. This Commission is without jurisdiction to issue an order prohibiting two Seattle bakers, neither of which does business of any kind outside the city, from conspiring solely with each other to fix local prices. Accordingly, the order will be modified to prohibit future collusion on prices "where any one or more of the parties to that plan-

ned common course of action, understanding, agreement, combination or conspiracy is selling bread in interstate commerce in competition with bread sold by any one or more of the other parties thereto."

Respondents' exceptions are denied. The initial decision and order as supplemented and modified to conform to the findings and views contained in this opinion will be adopted as the decision of the Commission.

Commissioner Anderson concurred in the result; Commissioner Elman dissented and has filed a dissenting opinion; and Commissioner Reilly did not participate for the reason that he did not hear oral argument.

February 28, 1964

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

In the Matter of	Docket No. 8309
BAKERS OF WASHINGTON, INC., et al.	

Commissioner Elman, dissenting:

I do not concur for the following reasons: The Commission's assertion of jurisdiction seems to me to be, at least, highly questionable. On the merits, the finding of an illegal price-fixing conspiracy is not supported by the record. And, even assuming such a conspiracy has been proved, the order is not responsive to the needs of the situation.

I.

In *F.T.C. v. Bunte Bros. Co.*, 312 U.S. 349, the Supreme Court held that local practices are not within the Commission's jurisdiction under the Federal Trade Commission Act where they have a merely remote or indirect relationship to interstate com-

merce; they must be "in" commerce. Clearly, the Commission has jurisdiction over a price-fixing conspiracy if there are sales in commerce, or if the conspiracy extends across state lines, or if any of the means or instrumentalities by which the conspiracy is formed or carried out is in commerce. Moreover, the Commission would have jurisdiction, I believe, even over an essentially local price-fixing conspiracy, if one of the participants was engaged elsewhere in interstate commerce and used power or resources, derived from ints interstate activities, in furtherance of the conspiracy, for example by bring pressure on local competitors or customers to join or continue in the conspiracy. Cf. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115; *Borden Co.*, F.T.C. Docket 7474 (decided Feb. 7, 1964), pp. 2-4 (dissenting opinion). But, so far as appears from the record, none of these conditions obtains in the present case. No interstate sales were involved in the alleged conspiracy*; the markets involved were all within a single state; none of the other acts involved in the alleged conspiracy was in commerce; and interstate commerce was not used as a weapon for suppressing intrastate commerce.

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*As to the evidence that some members of the respondent trade association made sales in Alaska, I find no indication that these sales were part of the alleged price-fixing conspiracy. The vast majority of the association members, who did no business in Alaska, had no interest in fixing prices there. And the theory on which this case was tried is that there was a conspiracy to fix prices in the Washington, not the Alaska, market.

I do not believe that the Commission, under the Federal Trade Commission Act, has jurisdiction over interstate companies as such (compare, e.g., Section 7 of the Clayton Act, as amended; *Foremost Dairies, Inc.*, F.T.C. Docket 6495 (decided April 30, 1962), pp. 36-37), which seems to be the upshot of the Commission's jurisdictional holding. Certainly *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, on which the Commission chiefly relies, stands for no such proposition. The Supreme Court's detailed tracing in that case of the interstate ramifications of the typical large insurance company was directed to showing that the insurance business is a commercial activity like any other, and that the localized act of contracting for insurance is just one aspect of the business; such an analysis was required because of earlier Supreme Court decisions which had held that the insurance business was basically not commerce at all. Since the indictment in *South-Eastern Underwriters* charged nothing less than a single combination to fix the price terms upon which insurance business was conducted throughout a six-state area, the decision can hardly be said to have established that any restrictive practice by an integrated multi-state enterprise, however localized in its scope and character, is within the reach of the federal antitrust laws, and in particular of Section 5.

II.

Direct evidence is rarely available to prove a conspiracy or secret agreement to fix prices. To establish the requisite meeting of minds, it may often be necessary to rely exclusively on circumstantial evidence. Considered individually, the circumstances may be equally consistent with an inference of innocence as with one of guilt; the pattern may have a significance which the pieces lack. But in the present case I fail to discern a pattern indicative of unlawful price fixing.

The Commission in its opinion makes much of the fact that "prices" were occasionally mentioned at meetings of the respondent trade association But I find it difficult to see a sinister significance in this fact, since the ostensible — and concededly legitimate — purpose of the association was to act as the collective bargaining agent for its members. Some discussion of prices, surely, is inseparable from discussion of wages. Indeed, in *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149, the Supreme Court held that it was an unfair labor practice for an employer to refuse to furnish information as to his financial status to substantiate his claim of inability to pay a requested wage increase.

Next, the Commission emphasizes — and exaggerates — the price uniformity prevailing among the

members of the association. Actually, all the record shows is that the prices charged by the largest bakeries were generally the same, and that a price increase by one was soon followed by the others. These facts do not suggest abnormal competitive behavior, especially since bread is a highly standardized product and the bakeries have virtually identical costs.

The Commission places very great emphasis on the conduct of Arthur Lalime, the association's manager. Lalime, the Commission observes, had a ''philosophy'' of antipathy to bread price wars, and he occasionally communicated his feelings on this subject to some of the members of the association. It was not unnatural for Lalime, whose job was labor negotiations, to have definite views on the price of bread. That he expressed his views on a few occasions to a few of his employers does not, without more, prove that he was a participant in or agent of a price-fixing conspiracy. If all he did was "tell them that a price war would be very devastating to the industry," surely that does not make him a price fixer.

There is some evidence that Lalime occasionally crossed the line between persuasion and intimidation, and also that he sometimes communicated price information to members of the association. Such conduct was *ultra vires* his position as manager of the association, and there is no evidence that the members

of the association (apart, of course, from those he allegedly communicated with improperly, who are not respondents in this proceeding) were aware of this conduct, let alone that they put him up to it. The Commission is unable to link up the members of the association in price-fixing conspiracy, except on the theory, which the record does not support, that they "should have known" of Lalime's misbehavior.

Viewed severally or as a whole, the circumstances upon which the Commission relies do not permit an inference of a conspiracy or agreement to fix prices; they form no sinister pattern. At most, they suggest that Lalime acted with excessive and officious zeal in expressing his views on price wars.

III.

Even if the Commission is correct in its conclusion that a price-fixing conspiracy or agreement has been established, I have reservations concerning the appropriate remedy. Stripped of redundancies, the Commission's order is simply a general prohibition against unlawful price fixing. While I do not believe that an order which merely repeats the applicable statutory provision or rule of law is necessarily inappropriate as a remedy for unlawful conduct, in the present circumstances I think it falls short of the most effective relief.

To prevent recurrence of the unlawful conduct, the order in a price-fixing case such as the present, where the existence of a conspiracy is inferred from circumstances which in themselves are for the most part innocuous, should not simply enjoin the conspiracy. Conspiracy is a rather shadowy thing. Its essence is not overt conduct, but a meeting of minds. There may be some deterrent value to enjoining participation in a price-fixing conspiracy. But in view of the existence of criminal sanctions for price fixing, there is a question how much additional deterrence is provided by such an injunction. Moreover, effective deterrence would seem to require that the persons subject to an injunction have a reasonably clear idea of the conduct they must avoid if they are to comply with it.

What, concretely, must respondents do to comply with the Commission's order in this case? Must they dissolve the trade association? Abandon multi-employer collective bargaining? Fire Lalime? Monitor all his telephone conversations? Repudiate his "philosophy?" Cease providing customers with notice of price increases? Engage in price wars? I take it they need do none of these things; but if they do not depart from the overt conduct on which the Commission bases its inference of unlawful price fixing, how can they be sure that they have ceased to conspire? Under the kind of general order entered here, respondents'

only guides are their consciences They are being ordered to refrain from conspiring to fix prices but are not being told what, if anything, they must do to obey this order. If that is all the order does, one wonders, to repeat, whether a significant deterrent has been added beyond the criminal prohibitions to which price fixers are subject in any event.

In my opinion, the way to "beef up" a price-fixing order, and avoid the pitfall of ineffectual generality, is to forbid not only the conspiracy itself but also the specific acts and practices upon which the effectiveness of the conspiracy — its translation into actual anticompetitive conduct — depends. It is immaterial that these acts and practices may be lawful in themselves; the Commission has ample power to forbid them if necessary to ensure that the conspiracy will cease and not be resumed. *F.T.C. v. National Lead Co.*, 352 U.S. 419, 430. It might be appropriate in this case — on the assumption that a conspiracy was established — to direct the trade association to terminate its employment of Lalime, who, on the Commission's view of the case, was the prime actor in the conspiracy; to order that a complete record be kept of all association meetings and turned over to the Commission periodically; and to forbid respondents to send price-increase notices to customers more than, say, three days in advance. Conceivably, the Commission might even enjoin respondents' joint bargaining

with labor. Cf. Hale, *Agreements Among Competitors: Incidental and Reasonable Restraints of Trade,* 33 Minn. L. Rev. 331, 339-43 (1949). These are examples — not the only and not necessarily the best examples — of what a price-fixing order in a case such as the present can and should provide if it is to offer a fair promise of effectively stopping the conspiracy.

February 28, 1964

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

In the Matter of

BAKERS OF WASHINGTON, INC., an incorporated association, its officers, Board of Trustees, employees, representatives and agents, including but not limited to the following:
GEOGRE B. BUCHAN,
RICHARD HOYT,
ARTHUR H. LALIME;
the following named members of respondent association:
BUCHAN BAKING CO.,
CONTINENTAL BAKING COMPANY,
LANGENDORF UNITED BAKERIES, INC.,
HANSEN BAKING CO., INC.,
TRENNERY'S BAKERY CO.,
SNYDER'S BAKERY, INC., corporations.
JOHN M. LARSON, trading as LARSON'S BAKERY,
VIC H. GOETHALS, trading as FORTUNE'S BAKERY,
each individually and as a member of the respondent association and all as representative of all of the members of respondent association;
SAFEWAY STORES, INC. and
HOLSUM BAKING COMPANY, corporations.

Docket No. 8309

FINAL ORDER

The Commission by orders of May 21, 1964, and June 3, 1964, having reopened this proceeding, reserved ruling on respondent Continental Baking Company's petition for reconsideration, remanded the proceeding to the hearing examiner, and stayed the effective date of the order to cease and desist previously entered herein, for the purpose of permitting respondent Continental Baking Company an opportunity to "show the contrary" of certain facts officially noticed by the Commission in its decision of February 28, 1964; and

The hearing examiner having received further testimony pursuant thereto on July 20 and 21, 1964, and having certified the record thereof to the Commission on September 24, 1964, together with his recommendation that the Commission affirm its original decision of February 28, 1964; and

The Commission, having considered respondent Continental's exception to that recommended decision, together with its proposed findings of fact, conclusions of law, and argument in support thereof, including respondent's argument that certain changed circumstances require a dismissal of the proceeding, and having considered the proposed findings of fact and conclusions of law proposed by counsel supporting

the complaint and respondent Continental's reply thereto; and

The Commission having concluded that respondent, after having full opportunity therefor, has failed to "show the contrary" of the facts heretofore officially noticed except as noted in the accompanying opinion; that respondent Continental's proposed findings of fact, conclusions of law, and arguments in support thereof should be rejected except as noted in the accompanying opinion; that respondent's exception to the recommendation after remand and its request that the complaint be dismissed by reason of alleged changed circumstances should be denied; that respondent's petition for reconsideration of the Commission's earlier decision should be denied; and that the order to cease and desist previously entered herein should now be made effective:

IT IS ORDERED that the findings of fact noticed in the Commission's opinion of February 28, 1964, be, and they hereby are, modified in accordance with the accompanying opinion, and that respondent's proposed findings, conclusions, and arguments, except as otherwise indicated in the accompanying opinion, be, and they hereby are, rejected.

IT IS FURTHER ORDERED that respondent Continental's exception to the recommendation after remand, request for dismissal on the basis of alleged

changes in circumstances, and petition for reconsideration of the Commission's earlier decision be, and they hereby are, denied, and that the order to cease and desist issued February 28, 1964, be, and it hereby is, made effective with the issuance of this order.

IT IS FURTHER ORDERED that respondents named in the Commission's order of February 28, 1964, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist issued February 28, 1964.

By the Commission. Commissioner Elman dissenting, and Commissioners Reilly and Jones not participating for the reason that oral argument was heard prior to their taking the oath of office.

S — JOSEPH W. SHEA,
Secretary.

SEAL

ISSUED: December 3, 1964.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

In the Matter of

BAKERS OF WASHINGTON, INC., an incorporated association, its officers, Board of Trustees, employees, representatives and agents, including but not limited to the following:
GEOGRE B. BUCHAN,
RICHARD HOYT,
ARTHUR H. LALIME;
the following named members of respondent association:
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JOHN M. LARSON, trading as LARSON'S BAKERY,
VIC H. GOETHALS, trading as FORTUNE'S BAKERY,
each individually and as a member of the respondent association and all as representative of all of the members of respondent association;
SAFEWAY STORES, INC. and
HOLSUM BAKING COMPANY, corporations.

Docket No. 8309

OPINION AFTER REOPENING

By Dixon, Commissioner:

On February 28, 1964, the Commission issued its decision and order in this matter, directing respondents to cease and desist fixing bread prices.[1] In finding that the unlawful acts and practices had occurred in interstate commerce, as required by Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, the Commission took official notice of certain facts[2] concerning respondent Continental Baking Company's organization and business that had been developed in another and earlier proceeding before this agency, *In the Matter of Continental Baking Company,* Dkt. 7630 (1963). Thereafter, at the request of respondent Continental, the Commission remanded[3] the instant proceeding to its hearing examiner for such further hearings as might be necessary to give Continental, in accordance with Section 7(d) of the Administrative Procedure Act, "an opportunity to show the contrary" of those facts officially noticed from the earlier record. Pursuant to that order of the Commission, hearings were held in Seattle, Washington, on July 20 and 21, 1964, and the record thereof was certified

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[1] *In the Matter of Bakers of Washington, Inc.,* FTC Dkt. 8309, reported in 3 CCH Trade Reg. Rep. Par. 16,843 (February 28, 1964).

[2] *Id.,* Commission's opinion, pp. 15-20.

[3] Opinion, reported in 3 CCH Trade Reg. Rep. Par. 16,915 (May 21, 1964).

to the Commission on September 24, 1964, together with the hearing examiner's recommendation that the Commission affirm its earlier decision in the matter.

In its effort to "show the contrary" of the facts officially noticed by the Commission in its opinion of February 28, 1964, respondent Continental called eight (8) witnesses, including its regional manager from its regional office in San Francisco, California; its plant manager in Seattle; and six (6) of the Seattle plant manager's supervisory subordinates (e.g., a sales manager, a route supervisor, etc.). Their testimony covered just over 200 pages.[4] The Commission's attorney called no witnesses, but introduced, pursuant to a stipulation with opposing counsel, certain excerpts from the testimony of Continental's president, R. Newton Laughlin, before the Senate Subcommittee on Antitrust and Monopoly.

The substance of the facts noticed in our earlier opinion may be summarized as follows. Ultimate responsibility for the affairs of Continental Baking Company is centered in the company's headquarters in Rye, New York. Its 29-state (and District of Columbia) bakery operation is divided into a number of "regions," each of which covers several states and is headed by a "regional manager" responsible to the home office for the successful operation of the

[4] Tr. 675-907.

individual baking plants located in his multi-state area. The individual bakery, headed by a "plant manager" responsible first to his "regional manager" (who is frequently located in another state) and ultimately to the home office in Rye, New York, sells the company's bread in an assigned territory through driver-salesmen who call on such local purchasers as grocery stores, restaurants, and so forth. At the three major "levels" of corporate responsibility — headquarters, region, and plant — that responsibility is vested in an executive (president, regional manager, plant manager), aided by a staff divided along functional lines (*e.g.,* personnel, engineering, production, purchasing, sales, and so forth).

The home office in New York was found to have exercised ultimate control over the territories assigned to the several regions and to the individual plants within those regions. It was also found that the home office in Rye, New York, does the purchasing for the company as a whole, buying and paying for raw materials for the individual baking plants from suppliers located in many states; that the home office, in the interest of maintaining a uniform standard of quality for its products (for example, "Wonder Bread"), prescribes production methods and standards through the issuance of "production bulletins" and regional supervision; that the home office in New York approves all price changes by the individual

baking plants; that the home office collects from its individual baking plants all monies received by them for sales of Continental products, taking care of bakery expenses by sending money to them from New York, depositing it in "local" bank accounts for the use of the individual plants; that the home office prescribes an accounting system to be followed by the individual baking plants, requiring from them a detailed *weekly* report of production, sales, profit and loss, and so forth, in addition to sending auditors to check their books twice a year or more, and regional cost analysts to evaluate the efficiency of their operation; that the home office in New York selects regional managers and, through them, managers and department heads of each of the local baking plants, frequently shifting managers from one plant and region to another; that the home office purchases all employee insurance; that the home office, through its regional officials, supervises the maintenance of the individual baking plants and the delivery trucks used by them; that the home office, through its own "labor relations man," supervises the negotiation of its bakeries' labor contracts; that the home office, through its own "art department," designs most of the packages and wrappers in which its bakeries sell its products; and that the home office in Rye, New York, through its own "advertising department" there and a retained New York advertising agency, produces, places, and

pays for virtually all of the company's advertising, including that placed in both national and local media, and supplies the bakeries themselves with "point-of-purchase" advertising materials to be placed in grocery stores.

These are the essentials of Continental's multi-state organization and operation as described by its headquarters, regional, and other officials in the earlier Commission proceeding referred to above. In their effort to "show the contrary" of those facts insofar as the Seattle bakery is concerned, respondents have now offered testimony that we think can be summarized as follows. The Seattle bread plant (together with the company's Seattle cake plant) is under the jurisdiction of a "regional office" located in San Francisco, California, as are similar plants located in the four states of California, Utah, Oregon, and Washington, a multi-state territory with a circumference of some 3,500 miles. The manager of that regional office has six department heads reporting to him: a regional production supervisor; a regional personnel director; a regional engineer; a regional vehicular supervisor; a regional cost analyst; and a regional sales manager.

The manager of the Seattle plant (who also manages the company's Seattle cake plant) reports to that regional manager in San Francisco. This Seattle plant

manager, in turn, exercises his management control through several supervisory subordinates having responsibilities somewhat similar to those of their counterparts at the higher regional level, including a production superintendent; a chief engineer; a garage superintendent; a sanitation superintendent; an office manager; and four sales managers. The sales managers are in charge of 21 "route supervisors," who in turn supervise 112 "route salesmen." These salesmen sell and deliver bread baked in Continental's Seattle plant to some 3,500 Washington customers, including grocery stores, restaurants, and so forth, an average of just over five driver-salesmen for each route supervisor, and some 30 or more customers for each salesman. Both the route supervisors and the driver-salesmen reporting to them are paid a combination of a base salary plus a commission on sales. The bakery loads the delivery trucks overnight in accordance with the driver's instructions of the previous evening, the driver's request being based on his estimate of his needs for the next day's deliveries. He calls on each customer on his route (*e.g.,* grocery stores) at least once each day, returning to some of the larger stores several times during the day, replenishing the grocer's supply of bread, cleaning and straightening the loaves on the shelf space assigned to him by the grocer, putting up (with the grocer's permission) signs and displays or "point-of-purchase" advertising ma-

terials, and otherwise trying to increase the sales of his product (for example, "Wonder Bread") by the store to consumers.

This testimony thus affirms the essentials of the Commission's noticed findings as to Continental's organizational structure and general operational methods.

In several particulars, however, the testimony offered here does attempt to "show the contrary" of a number of the facts previously noticed by the Commission. Thus, the manager of Continental's regional office in San Francisco testified that the Rye, New York, "labor relations man" does not participate in the negotiations of the Seattle plant's labor contracts; while the regional and home offices doubtless approve those contracts, initial negotiation is a function of the Seattle bakery officials. Further, the Seattle plant manager does not need regional or home office approval to hire and fire his "department heads" (sales managers, etc.).[5] We accept these two corrections of our noticed findings.

His testimony in regard to a number of the other noticed facts is less persuasive, however. He claims

[5]This does not suggest, of course, that Continental's personnel policies are themselves a local matter. This Seattle plant manager, for example, was transferred there less than three years ago (February 1962), after more than four years in the company's regional office in San Francisco. And his present sales manager in Seattle has held that position for less than a year, having been transferred there from the position of production manager in the San Francisco plant.

that, whatever may be the practice of the company's other regional managers in other parts of the country, he exercises no control over the territory served by the Seattle bakery, its production methods, its sales, or its prices. As to the geographical limits of the Seattle plant's sales territory, he says he leaves this to the "terrain." He does not claim, however, that the Seattle plant manager could commence selling in any state it chose without regional or home office approval. And whether he, as regional manager, exercises any control over the production procedures and standards of the Seattle bakery is not particularly significant; the fact noticed here in our prior opinion is that the home office in Rye, New York, issues "production bulletins" prescribing uniform standards — and by this we understand minimum standards of quality for the company's major products, for example, "Wonder Bread" — while the regional production supervisor "is constantly in touch with the plants."[6] This witness testified that he had on his staff an official called the "regional production supervisor," and did not deny that this official "is constantly in touch with the plants," including the Seatle plant.

In regard to the matter of sales and pricing in the Seattle area, this regional manager's testimony that

[6]Opinion of the Commission, p. 17.

he leaves these solely to the discretion of the Seattle plant manager is wholly unpersuasive.[7] First, the suggestion that he has no responsibility for those activities in his region is flatly contrary to the testimony given in the earlier case by another of the company's regional managers, who said that his responsibilities were "to operate the business and the bakeries under my control and try to make some money . . . I am responsible for pricing in the trading area that I have charge of."[8] Secondly, this regional manager's denial of responsibility for pricing and sales in his region appears inconsistent with the fact that he has on his San Francisco staff an official called the "regional sales manager," and is contradicted by the further fact that a former holder of that position testified, in his proceeding, that in the course of his duties in that "regional" job, "I . . .

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[7]It is not entirely clear from this regional manager's testimony that he really intended to deny his general, over-all responsibility to the home office in New York for sales, prices, and thus profits in the Seattle area. In response to his counsel's question as to "whether or not you regard your function as the regional manager to *operate* the businesses and the individual bakeries *yourself*," he answered, of course, in the negative. Tr. 724 (emphasis added). And he further testified:

> Q. Are you responsible, Mr. Hooks, for the sales volume of each bakery or *is it more accurate to state that you are responsible for the sales volume of your region as a whole?*
>
> A. No; each plant is responsible for his own sales volume as well as his profits. [Tr. 725-726 (emphasis added).]

The fact that this regional manager holds each of the individual plant managers in his region "responsible for his own sales volume as well as his profits" is in no way inconsistent with the finding that *he*, the regional manager, is in turn held responsible, by the home office in New York, for, as his attorney put it, "the sales volume of your region as a whole."

[8]Opinion of the Commission, p. 18.

spent a great deal of time here in Seattle.'"[9] Thirdly, this claim that the San Francisco regional office exercises no supervisory control over Seattle sales and pricing is at odds with testimony and documents previously admitted in this case. At the original hearing, the then-manager of the Seattle plant, a Mr. Kenneth D. Covington, testified that while he could "suggest"[10] prices and price changes, they had to be "approved" by the regional office in San Francisco.[11] Continental's counsel summed up the testimony of that Seattle plant manager on this point by saying that "he writes a letter of recommendation to his regional manager and subsequently gets approval for a price change but . . . he did not mean to testify to, your Honor, that he was able to say what goes on internally in Rye, New York."[12]

A number of documents substantiated this, showing that, when the Seattle plant raised its prices in 1958, the manager of that plant sent a "recommendation" for the increase to his regional superior, the regional manager in San Francisco, who in turn submitted it

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[9]Tr. 709.

[10]Tr. 411, 426. He testified further:

Q. Did you also fill out a form, what Continental Baking Company calls a Form 487, in which you requested a price rise effective on September 22?

A. Yes, sir. [Tr. 448.]

[11]Tr. 427.

[12]Tr. 425.

to the home office in Rye, New York, for the personal approval of the company's president.[13] Questioned about these documents, the then-manager of the Seattle plant testified that he had also followed his procedure in raising his prices in 1960[14] The following testimony seems to us conclusive:

> Q. Now, I show that Exhibit 23E to the witness and I would like to ask the witness whether that indicates that the president of he company gave approval to the 1958 suggested price raise?
>
> THE WITNESS: Yes, it does.
>
> Q. And may I ask you, did you receive approval from the president of the company for your suggested 1960 price rise?
>
> A. I don't recall that I received approval direct from the president of our company. *Other than through our own regional office* [in San Francisco].[15]

In any event, however, the contention that the San Francisco regional office is a mere "service" unit exercising no executive control over the Seattle baking

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[14]Tr. 423, 424.

[13]CX 23A-D. See also CX 24-27, 29.

[15]Tr. 426-427 (emphasis added). This Seattle plant manager further testified that he discussed "the effect that the increased cost of labor would have on the price of manufactured loaves of bread" with his regional manage rin San Francisco, tr. 415, and that, when he ships bread to another Continental plant in Portland, Oregon, the price to be "charged" the sister plant "is computed by our regional manager," tr. 435-436. This is supported by the fact that the regional office has on its staff a "regional cost analyst," tr. 719. The Seattle plant manager was unable to say how the regional manager makes that computation, tr. 436-437, "Q. There is nothing to prevent him [the regional manager] from changing the discount from 40 to 50 or 30 [percent] of whatever he wants, is that correct? A. No, sir." Tr. 438.

plant,[16] even if accepted fully, would not warrant a finding that Continental's Seattle plant manager has unlimited pricing authority. Certainly there can be no doubt that, while he is permitted to initiate actions within certan limits of authority previously delgated to him by his superiors, and is allowed to "recommend" for their approval actions not within that area of his delegated discretion, he must, and does, account not just ultimately but *weekly* to the company's home office in Rye, New York. Here there has been no challenge of any kind to the noticed finding that: "Continental's baking plants follow an accounting system prescribed by the headquarters office in New York. *Each week they submit a report* that gives the home office in New York a complete breakdiwn on the *past week's production, sales,* percentage of 'returns,' etc. The *bakery also submits a weekly 'profit and loss' statement* [to the home office in New York]. A 'Travelling Auditor' audits the bakeries' books twice a year, and may also make additional visits. The regional cost analyst also checks on the bakeries."[17] In view of this close control over "production," "sales," and "profits" by the home office in New York, and in view

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[16]This regional manager suggested that Continental's individual baking plants in his region have an autonomy and independence comparable to that of the independently-owned bakeries associated with such organizations as Quality Bakers of America. Tr. 717-718. One of the Seattle plant officials carried it even further: he suggested that "the salesman out there on the route is in business for himself." Tr. 900.

[17]Opinion of the Commission, p. 17 (emphasis added).

of the obvious relationshp between volume, profits, and prices, even a finding that the Seattle plant manager initially sets his prices without consulation with the regional manager—a finding we do not believe is warranted—would not change the fact that those prices must be and are approved weekly in Rye, New York.

The other testimony by which respondent Continental has sought to "show the contrary" of the facts officially noticed is that of its Seattle plant manager and six of his Seattle supervisory personnel. Their testimony sought to show, in substance, that, notwithstanding the numerous specifics of control exercised over the Seattle operations by their superiors in the regional and home office, there is nonetheless a substantial residuum of discretion left to them. For example, without denying that all "major" advertising is handled by he home office, including the placing and paying for ads in the Seattle media and the supplying of "point-of-purchase" material to be placed in the grocery stores by Seattle driver-salesmen, they testified that the Seattle plant manager has been delegated authority to place small ads in weekly newspapers in the smaller towns.[18] He can employ "demonstrators" and his salesmen are permitted to supple-

[18] See tr. 786-787, where the placing of a small ad in two weekly newspapers ("subscritpion of 2,500 customers") in the Raymond-South Bend area is reported.

ment the "point-of-purchase" advertising materials received from New York with their own hand-lettered signs and displays.[19] Further, it was shown that the Seattle plant manager has been delegated the authority to make minor variations in the prescribed baking formulas and procedures in order to cater to particular local consumer tastes,[20] and even to experiment with new bread varieties[21] in his local area and new package designs for those varieties.[22]

The principal thrust of the testimony certified to us here, however, was toward the allegedly "local" nature of the activities of Continental's driver-salesmen. These 112 "route salesmen" deliver bread to established customers on their "routes" and also attempt to "sell" those potential customers that are not yet buying Continental's products. Since about 20% of their total compensation comes from commissions on sales,[23] these driver-salesmen naturally show considerable individual initiative in trying to increase their

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[19]"For example, you take a white card and you might just hit it with some green spray paint and then you give them to your salesmen and he will put on if he is trying to sell French bread, for example, he will put, 'Fresh French. Try a loaf this weekend,' or something of this nature, whatever he happens to come up with." Tr. 878-879.

[20]Some areas "prefer a darker crust color to the one we like in Seattle." Tr. 681.

[21]Tr. 682 (introduction in Seattle of a new "sesame-top bread" after a competitor had brought it out).

[22]*Ibid.*

[23]Tr. 833. "[E]very loaf you sell, you make 7 per cent, every extra loaf you sell over that, say, if my business increased $100 in the next week, that means $7 more in my pay check." *Ibid.*

sales of Continental's products. They make repeated calls on the local grocer, getting to "know some of his background, like if he likes to bowl or fish . . . I knew all my customers. I knew their families and I could talk to them . . . [B]y becoming a personal friend or trying to become a personal friend as close as you can with the grocer," the salesman can make him "more receptive to your speil, so to speak . . ."[24]

The skill of Continental's Seattle salesmen is hardly sufficient to establish that the business of selling "Wonder Bread" in Seattle belong to the salesmen, as several of respondent's witnesses intimated here, rather than to Continental Baking Company of New York. The fact remains that they are Continental's agents, driving Continental's trucks, selling Continental's bread, collecting Continental's money and turning that company money in each day for transmission to a New York bank. Those essentials, together with the further noticed facts that all of the raw materials used by the Seattle plant are bought and paid for by the home office in New York, are shipped to Seattle by out-of-state suppliers, and that everything done in the Seatle plant is subject to the rigid discipline of the weekly profit and loss statement that goes to New York, have all been conspicuously avoided in the testimony by which respondent Con-

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[24]Tr. 803-804.

tinental has sought to "show the contrary" of the facts noticed by this Commission in its earlier opinion.

Respondent raises one further point in its instant papers: it alleges that, if the Commission should conclude that Continental has not shown the contrary of the facts proviously noticed and thus that the price fixing did in fact occur in interstate commerce, "the Commission should exercise its discretion to dismiss this proceeding as no longer required by the public interest."[25] In support of this, respondent alleges that the price fixing found by the Commission occurred in 1957-1960; that this finding was based on the activities of the association's then secretary-manager, a man now deceased; that, of the two Continental employees involved in the matter, one has now retired and the other "is no longer employed by Continental"; that the association is now "defunct" and holds no meetings, price-fixing or otherwise; that one of the larger bakers found to have been a part of the conspiracy, Langendorf, has been acquired by a non-respondent baker; and that some of the 63 respondents named in the cease-and-desist order of February 28, 1964, may not have received copies of the order or other papers.

All of these contentions are patently insufficient as a matter of law to require dismissal. As to the last two

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[25] "Memorandum in Support of Proposed Findings of Fact, Conclusions of Law, and Exception to Recommendation of Examiner," November 13, 1964, at 26-27.

— whether all of the respondents in this case will be properly bound by our order — those are problems for the Commission and the courts, not Continental; it has long been settled that, while the Commission should and does attempt to deal as comprehensively as possible with widespread law violations, its failure to stop every member of an industry from violating the law does not require it to dismiss proceedings against the others. *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958); *In the Matter of Pacific Molasses Co.*, FTC Dkt. 7462 (Opinion of the Commission, July 20, 1964), 3 CCH Trade Reg. Rep. Par. 16,981.

Respondent's present contention that the trade association involved in the price fixing found here is now "defunct" illustrates why, in our earlier decision in this matter, we rejected respondents' request to have the order limited to a prohibition of price fixing accomplished hrough the particular instrumentality of this association, Bakers of Washington. We pointed out that "an order so limited would leave these respondents free to resume their conspiracy tomorrow, holding conspiratorial meetings at high noon in the most public place in the City of Seattle, so long as they kept the association, Bakers of Washington, out of the matter. Such an order would be no more effective than one limited to a prohibition of price fixing only where it was accomplished by meetings held in

a particular place, *e.g.*, at the Athletic Club in Seattle. The order could be avoided by using the telephone instead of having a meeting, or by moving the site of the meeting from the Athletic Club to other premises." The same considerations apply here. The dissolution of this particular association has no bearing on either respondents' capacity to fix prices or their demonstrated proclivity for doing so.[26]

Continental's other arguments on the "public interest" question were considered and rejected in our decision of February 28, 1964. An order will issue directing that the cease-and-desist order contained in that decision become effective forthwith.

Commissioner Elman dissented.

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[26]If the dissolution of the trade association is being advanced here as evidence of respondents' "abandonment" of the unlawful price fixing, the argument is even more unsound. It is well settled that a discontinuance of an illegal practice only after the law's hand is already on the offender's shoulder furnishes no basis for the dismissal of a case. *Coro, Inc.* v. *Federal Trade Commission*, ... F.2d ..... (1st Cir. 1964), 5 CCH Trade Reg. Rep. Par. 71,282. Moreover, the latest testimony of Continental's officials – that received on July 20 and 21, 1964 – provides us with scant reason for believing respondents have given up their opposition to competition. Continental's sales manager for the City of Seattle, referring to a competitor's recent offering of a 29¢ loaf when Continental's price was 35¢, testified that he "felt that it was wrong" and that it might cause a "bread war or something." So instead of lowering his own price, he sent Continental's salesmen out to take care of it: "Well, the salesmen individually did quite a job on that. They explained to the grocer the fact that it may lead to bread wars or something of that sort that would not be right and it would cut into the grocer's profit and cut into his [the salesman's] commission, because, after all, they work on a commission basis. They did quite a selling job and I felt it was their getting around and talking to these grocers that finally got this other company to get back up or to discontinue that particular deal, anyway." Tr. 759. So successful was this effort that, in some stores, "they actually had the other fellow thrown out or cut down drastically." Tr. 760.

Commissioners Reilly and Jones did not participate for the reason that oral argument was heard prior to their taking the oath of office.

December 3, 1964.

D-1

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

In the Matter of CONTINENTAL BAKING COMPANY, a corporation.	Docket No. 7630

FINAL ORDER

This matter has been heard on complaint counsel's appeal from, and respondent's exceptions to, the initial decision of the hearing examiner. For the reasons stated in the accompanying opinion, the Commission has determined that the findings contained in the initial decision should be adopted by the Commission in part only, and that the complaint should be dismissed. Accordingly,

IT IS ORDERED that the initial decision be, and it hereby is, adopted as the decision of the Commission to the extent consistent with he accompanying opinion.

IT IS FURTHER ORDERED that the complaint against respondent be, and it hereby is, dismissed.

By the Commission, Commissioner Anderson concurring in the result.

S — JOSEPH W. SHEA,
Secretary

SEAL

ISSU8D: December 31, 1963

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

In the Matter of CONTINENTAL BAKING COMPANY, a corporation.	Docket No. 7630

OPINION OF THE COMMISSION

By Commissioner Elman:

The complaint in this matter alleged that respondent, a corporation engaged in the manufacture and sale of bakery products, granted discriminatory discounts on sales of its products to retail grocery stores, in violation of Section 2(a) of the amended Clayton Act, and granted non-proportional advertising allowances to competing customers, in violation of Section 2(d) of the Act. Respondent in its answer denied these allegations and, in addition, alleged meeting of competition in good faith as a complete affirmative defense. After full evidentiary hearings on the allegations of the complaint and answer, the hearing exam-

iner filed an initial decision in which he dismissed the complaint on the ground that respondent had sustained its defense of meeting competition in good faith. Complaint counsel has appealed from this finding. Respondent, on this appeal, while supporting the examiner's finding on the meeting-competition issue, has excepted to certain other findings of the examiner. Since we have concluded that respondent has sustained its meeting-competition defense, and since meeting of competition in good faith is a complete defense both to the 2(a) charge (see *Standard Oil Co. v. F.T.C.*, 340 U.S. 231) and to the 2(d) charge (see *J. A. Folger & Co.*, F.T.C. Docket 8094 (decided September 18, 1962)), we need not reach respondent's exceptions; and we express no view on the correctness of the findings of the examiner to which respondent excepts.

Section 2(b) of the amended Clayton Act enables a seller to justify a price discrimination by showing that it was made in good faith to meet a competitor's equally low price. The burden of justifying discriminatory conduct in such fashion is, of course, on the respondent.

At the heart of Section 2(b) is the concept of "good faith." This is a flexible and pragmatic, not technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman re-

sponding fairly to what he reasonably believes is a situation of competitive necessity. *F.T.C. v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-60; see *Standard Oil Co. v. F.T.C.*, 340 U.S. 231, 249-50. Such a standard, whether it be considered "subjective" or "objective," is inherently *ad hoc*. Rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application. Thus, the same method of meeting competition may be consistent with an inference of good faith in some circumstances, inconsistent with such an inference in others.

In the present case, we find as a fact that respondent has sustained its 2(b) defense. A record of more than 1,000 pages was compiled on the 2(b) issue in this case. It consists of the exhaustive examination and cross-examination of many customers and employees of respondent, covering every discount or service challenged in the complaint. After carefully analyzing this record, the hearing examiner concluded that respondent's discount policy had been formulated and implemented in good faith, honestly, reasonably and prudently, in order to meet competition. We agree with his analysis of the evidence. We do not, however, necessarily agree with his entire discussion of the law of Section 2(b). Accordingly, we do not

adopt that part of the initial decision.

Briefly, the record shows the following. Prior to 1953, respondent refused to grant discriminatory discounts, although its major competitors had, for many years, been granting such discounts on a large scale. As a result of its forbearance, however, respondent's market position had been so impaired that by 1953 respondent felt compelled to reconsider its no-discount policy. Its officers decided that in order to avert a further drastic loss of business it would be necessary to grant some discounts.

The discount policy adopted by respondent as a result of the competitive situation it faced was a highly selective one. It permitted a discount to be granted to a particular customer only where an equal or larger discount had been given by a competitor of respondent on a competing product line and respondent would not be able to continue selling to the customer in question without granting such a discount. In other words, discounts by respondent were available only in actual competitive situations.

Care was taken by respondent to ensure the genuineness of the competitive necessity for particular discounts. In every case, customers' claims that they were receiving discounts from competitors of respondent were adequately verified by respondent's on-the-spot sales representatives. In fact, in every instance

of record in which respondent granted a discount, its competitors' discount to the customer in question was equal to or larger than respondent's, and the latter's net price to the customer was no lower than its competitors' net prices.

We have concluded that the foregoing facts and circumstances (which apply equally to respondent's grant of advertising allowances to meet equivalent advertising allowances granted by competitors of respondent) demonstrate respondent's compliance with the good faith meeting of competition standard. Where, as here, a seller has affirmatively shown justification for selective price reductions, as "good faith" responses to the exigencies of competition, Congress provided the shelter of Section 2(b).

Accordingly, the complaint against respondent is dismissed.

Commissioner MacIntyre has filed a separate opinion.

Commissioner Anderson concurred in the result.

December 31, 1963.

DAYCO CORPORATION, Petitioner,
v.
FEDERAL TRADE COMMISSION, Respondent.

No. 16215

United States Court of Appeals
Sixth Circuit.

June 17, 1966.

[180]

Before WEICK, Chief Judge, and O'SULLIVAN and PHILLIPS, Circuit Judges.

O'SULLIVAN, Circuit Judge.

The petition of Dayco Corporation of Dayton, Ohio, asks our review of a decision of the Federal Trade Commission which found that it was violating Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), by selling like products to competing sellers at different prices and violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by entering into agreements to fix resale prices. The FTC's complaint was filed October 1, 1959, and its final order, which in part adopted a Hearing Examiner's initial decision, was entered August 5, 1964.

Dayco Corporation makes and markets automobile replacement parts. Its share of the national market is estimated at 15%, as against 65% controlled by Gates Manufacturing Co. Another company has about 5%, and the balance is shared by smaller companies. The FTC found that "The operations of that department [Dayco's automotive replacement parts] have not been very profitable in the past several years, an actual loss having occurred in 1960, which was described as a 'disastrous year'." Count I of the FTC complaint dealt with the alleged price discrimination and Count II with the alleged price fixing.

1) *Price discrimination.*

The FTC complaint, after general charges of price discrimination between competing purchasers, the effect of which was to impair competition, specified the following as the wrongful conduct of Dayco,

> "(a) Granting rebates and allowances of up to 20% off its wholesaler prices schedule to some of its direct wholesaler purchasers while denying such rebates and allowances to other such wholesaler purchasers; and
>
> "(b) Charging its indirect wholesaler purchasers prices which are up to approximately 25% higher than the prices it charges its direct wholesaler purchasers."

The distribution structure through which Dayco assured the availability of its products involved basically a three level turnover: (1) warehouse distribu-

tors; (2) direct and indirect jobbers; (3) dealers — retail outlets (garages, etc.). Dayco did not sell to retailers. The need for this separation of functions arises from the nature of Dayco's products. These include fan belts, radiator and heater hoses, and other principally rubber or plastic automotive replacement parts. These items must be stocked in a broad range of styles and sizes to fit differing makes and models of cars.

The various distributional levels reflect the needs of the market with the retailers stocking only the most popular items, the jobbers keeping a somewhat broader range, and the warehousers stocking the fall spectrum of sizes and styles.

Although Dayco's effect to stimulate the market for its products were directed at all levels of distribution, it sold only to jobbers who, from the standpoint of price were, on the one hand, warehouse distributors and jobbers who resold only to other jobbers; and, on the other hand, jobbers who resold to retailers. The violation was found in the fact that those of Dayco's customers who resold only to jobbers received generally a rebate of 20% off of the list price, while the jobbers who resold to retailers (dealers) paid the full wholesale list price.

To make out its case the FTC first took the testimoney of Dayco's sales manager. He described

Dayco's methods of marketing its products, explaining the reasons for the necessities and advantages of such methods. His testimony disclosed the complexities of Dayco's distribution system and although it did not

[181]

attempt accurate cost justification for the lesser price charged to warehouse distributors, it did disclose the operational advantages of selling through warehousers and other jobbers who resold only to jobbers. The evidence disclosed the development nationwide of warehouse distributors through whom Dayco had to deal to survive competitively, and who demanded a price discount in exchange for the advantage to Dayco's distribution that flowed from such methods. From the testimony first adduced, it could not be said that those customers who received the 20% discount, wholesalers and jobbers who resold only to jobbers, were in competition with jobbers who were selling directly to the retailers. A contrary view, however, was the basis for the Commission's ultimate conviction of petitioner of violation of the Robinson-Patman Act. It contended, and by employment of the procedural device of official notice hereafter discussed, found, that one such warehouse distributor was but a bookkeeping device used to camouflage what were in effect direct sales to jobber members of a cooperative buying group formed to take advantage of the 20% discount offered

to "warehouse distributors" by Dayco. It further found that these particular jobbers then sold, at a substantial competitive advantage, to retailers in competition with other jobbers who did not have the benefit of such a discount.

The mechanics of operating this system for any individual purchase (as found by the Commission) involved Dayco billing the nominal warehouse for the discounted wholesale price, and the warehouse in turn billing its jobber-member for the same discounted price plus a service charge of 0%, 2% or 5%, depending on the method of storage, delivery and packaging. Any profit derived from these charges would be returned to individual jobbers at the end of the year in proportion to their purchases.

We forego recitation of additional details of Dayco's methods of distribution and the market in which it was competing; they are not necessary to our decision. Better understanding of methods under attack could be gained by reading the cases of General Auto Supplies v. FTC, 346 F.2d 311 (CA 7, 1965) and Monroe Auto Equipment Co. v. FTC, 347 F.2d 401 (CA 7, 1965) which sustained findings of violation, in the one by a manufacturer, and in the other by distributors in the automotive replacement parts business.

After taking of the testimony of the sales manager of Dayco, which admittedly did not make out the case

which we have narrated, the FTC's trial examiner entertained and granted a motion made by "counsel supporting the complaint," denominated "Motion to Take Official Notice and the Recognize Presumptions."

If the FTC's use of official notice to make out its case of price discrimination went beyond permissible limits, its decision must be reversed. That the validity of its decision depends upon the procedural propriety of its taking such notice was conceded by the FTC in its decision as follows:

> "Since the proof of *several essential elements* of both price discrimination charges[1] hinges upon whether the *examiner acted correctly in taking official notice,* that question will be discussed before we turn to the other questions raised on this appeal." (Emphasis supplied.)

The official noice used by the FTC here was, in the main, the appropriation for this case of testimony and findings which FTC had taken and made in a previous case in which it had prosecuted and convicted a Dallas concern, Automotive Jobbers, Inc., (hereafter, AJI) for violation of Section 2(f), 15 U.S.C. § 13(f). Upon the proofs in that case, the Commission found that AJI was a so-called "buying group" of jobbers dealing in automotive replacement parts who had, as

[1]A second charge of discrimination, flowing from a six-year-prior pricing practice, was dismissed by the Commission.

members thereof, organized a corporation which maintained a warehouse in Dallas and purchased products of Dayco and other suppliers; that AJI obtained substantial discounts from its suppliers list prices and so resold to its jobber-members as to pass on to them a substantial portion of the discounts; that this was accomplished by billing the jobbers at the discount price plus a service charge of 5% on purchases made from the warehouse supply, 2% where the purchases went first to the warehouse and then were immediately transshipped to the jobber — a "slot" shipment, and no charge when the purchases were delivered directly to the jobber from the supplier — a "drop" shipment. While the record is unclear, there was evidence of some cases where the jobber purchasing from AJI was billed at Dayco's list price but shared in the discounts because, as found by the official notice, AJI "annually or periodically distributed to the jobber-members all discounts and rebates received, less operating expenses, in proportion to the amount of each member's individual purchases." The proofs and findings officially noticed were also to the effect that AJI operated a warehouse in which it "usually maintained at least a minimum stock of the suppliers' automotive products"; that AJI was billed for its purchases by Dayco and other suppliers and settled all of its accounts for goods ordered, whether stored in its warehouse or "drop" or "slot" shipped to AJI's customers; that

AJI made no sales to retailers or dealers, but only to jobbers; that any independent jobber in the same area as AJI or elsewhere who resold its purchases from Dayco only to other jobbers enjoyed the same discounts as were afforded AJI; and that jobbers who purchased from Dayco and directly resold to retail dealers, were not given such discounts.

The FTC also took official notice of facts developed in its Automotive Jobbers, Inc., case disclosing the internal organization of that concern, its by-laws, its corporate purpose "to receive quantity discounts" and the identity of thirteen of its members doing business in some ten different cities in Texas. It went on to find by official notice that jobbers in various Texas cities were in competition with each other, whether members of AJI or not, the critical application being that AJI members who purchased from AJI and resold to retail dealers were in competition with other jobber customers of Dayco who sold to retail dealers. The following were contained in the official notice:

> "(n) In practice and effect, AJI has been, and is now, serving as the medium or instrumentality by, through, or in conjunction with, which its jobber members exert the influence of their combined bargaining power on the competitive suppliers hereinbefore described. As a part of their operating procedure, said jobber members direct the attention of suppliers to their aggregate purchasing power as a buying group and have demanded and received, upon their individual purchases, the prices, discounts, allowances and

rebates hereinbefore referred to. Suppliers not acceding to such demands are usually replaced as sources of supply for the commodities concerned and such market is closed to them in favor of such suppliers as can be, and are, induced to afford the prices, discounts, allowances and rebates so demanded."

The official notice then concluded that:

"3. Based upon facts found and presumptions and inferences made by the Commision and the courts in prior decisions (cited at pages 8 and 9 of the present motion), the following facts and presumptions are officially noticed as prima facie evidence for the purposes of this proceeding:

(a) Automotiye parts jobbers located in the same cities and metropolitan areas, and in cities and towns in geographic proximity, are in competition with each other; and, specifically:

* * *

(b) The Automotive parts industry is a highly competitive business involving small margins of

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profit. Typically automotive parts jobbers realize a net profit after taxes of less than five per cent, and the net prices paid by jobbers is of such importance that they are careful to take advantage of a discount as small as the two percent cash discount, prevalent in the industry, in paying their bills, the failure or inability to take such a discount being of the utmost economic importance to such jobbers' competitive existence."

Wihout further extension of the subject, it will be sufficient to say that, by his order, the FTC's trial examiner substantially granted the entirety of what

the motion therefor asked, namely:

> "Certain facts found by the hearing examiner in an initial decision filed October 13, 1961, and adopted by the Commission on January 4, 1962, in Docket No. 7590, with respect to *the character, membership, purposes, methods of operation, and procedures of the primary respondent* in that case, Automotive Jobbers, Inc." (Emphasis supplied.)

The Initial Decision of the Trial Examiner repeated for his Findings of Fact substantially all of the facts which he had officially noticed. That his finding of Dayco's guilt was entirely the product of his use of the specific record made in Automotive Jobbers, Inc., 60 FTC 19 (1962) is made plain by his finding No. 65. Therein he refused the request of counsel supporting the complaint to find that Dayco had violated the law in its dealings with "fifteen other buying groups." He said,

> "Counsel supporting the complaint persuasively argues that the record also shows that Dayco sold its products to fifteen other buying groups at the same prices and under the same terms and conditions as to AJI, and with similar competitive effects (CSC proposals, pp. 6-9). *The record does not contain any reliable evidence, however, showing the internal organizations and methods of operation of such other buying groups.* The testimony and other evidence provide a basis for suspecting that the other buying groups operate in much the same fashion as AJI; and that, in selling to them at prices applicable to products for resale to jobbers, Dayco granted similar price advantages to their members with similar competitive effects. *But the record does not, either*

directly or by sound inference, establish such suspicions as facts. Accordingly, it cannot be concluded on this record that Dayco has granted unlawful price discriminations to other buying groups or their members." (Emphasis supplied.)

The complaint against Dayco was not limited to claimed illegality in its selling to Automotive Jobbers, Inc., and the foregoing quotation from the Trial Examiner's decision makes clear that except for incorporating by reference virtually its entire case against that concern, the FTC failed to sustain the charge of its complaint. The Final Order of the Commission did not limit its cease and desist command to Dayco's dealing with Automotive Jobbers, Inc., despite its examiner's finding that no case had been made except as to such concern.

Although the Commission's Decision disagreed with its examiner in a particular of no importance here, it adopted his findings based on the Automotive Jobbers case and clearly relied on the reach of official notice to make its decision. The Commission itself made even more detailed use of the AJI record, setting forth in several places extended quotations and summaries from testimony given by some five witnesses in the AJI case and adopting the facts appearing therein by "official notice."

It is of some interest to relate the timing of the procedures in this and the Automoive Jobbers case.

The complain against the latter was filed September 21, 1959. Although Dayco could have been joined in that Section 2(f) proceeding, see Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 79, 73 S.Ct. 1017, 97 L.Ed. 1454, 1466 (1953), the Commission, on Oc-

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tober 1, 1959, chose to begin this case as a separate charge of a Section 2(a) violation. Dayco was not notified of the AJI case nor invited to participate. The record here does not disclose when the testimony was taken in the AJI case, but the Initial Decision was led on October 3, 1961, and was adopted as a matter of course by the Commission on January 4, 1962. Automotive Jobbers, Inc., et al, 60 FTC 19. On February 2, 1962, the Automotive Jobbers, Inc., was voluntarily dissolved. Thereafter, on April 9, 1962, the FTC began the taking of testimony to sustain its case against Dayco. Concededly, the FTC did not carry its burden of proof by this evidence. Thereafter, on May 15, counsel supporting the complaint made the discussed "Motion to Take Official Notice and To Recognize Presumptions." This was granted on June 14, 1962, over the objection of Dayco. Thereafter, Dayco put in testimony by its Dayton counsel relative to correspondence and contacts with the Federal Trade Commission in 1958 seeking to learn what marketing practices were considered illegal, particularly with

reference to the so-called buying groups. He stated that he had asked that they "tell us what is verboten," and was told "that those were matters that could not be made public and were not made public, and I learned nothing." Dayco declined to put in any evidence in an attempt to disprove the case the FTC had made against AJI and adduced against Dayco. While it argues here that even accepting the facts of the offiicial notice, a violation by it was not established, Dayco's primary reliance is on the procedural question. We decide the appeal on that issue.

[1] We have at length set out the procedures employed by the FTC to "prove" its case against Dayco. We think the question of their validity is answered by the foregoing recitations. However salutary the liberal use of official notice may be as an aid to the Federal Trade Commission and other administrative agencies in the dispatch of their business, due process must be observed in such use. Section 7(d) of the Administrative Procedure Act, 5 U.S.C. § 1006(d), provides that where "any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." The section, however, attempts no definition of "official notice" and a litigant need not undertake to use his "opportunity to show the contrary" until official notice has been properly employed.

The FTC concedes that no decision heretofore announced is in point.

> "There do not appear to be any cases in which courts have explicitly determined whether notice may be taken of facts litigated in prior cases involving other parties, where the parties in the current case contest the facts or the court's action in taking judicial notice." (Opinion of the Commission)

[2] In their address to us, the FTC counsel invite us to move official notice to new ground. Recognizing an exception to the hearsay rule by use of prior testimony, "in later trials if there is *an identity of parties,*" it observes that "there is a developing trend to widen the exception," and ask us to adopt a rule which would allow the FTC to make out a case against the first of several accused, and then simply rest upon that case in subsequent proceedings against different parties. We decline to move to the new ground suggested, not out of timidity but because to do so would, in our view, do violence to fair play and due process.

Decided cases and some treatises on the subject provide little guidance and no precise definitions of the permissible reach of official notice. 2 Am.Jur.(2) 192, Administrative Law § 385; 73 C.J.S. Public Administrative Bodies and Procedure § 123, p. 442; Anno. 18 ALR(2) 552; Davis, "Official Notice" 62 Harv. L.Rev. 537. Professor Davis' paper on the subject is an excellent discussion, but is primarily

expositive of the difficulties that attend application of the rule of specific cases. We find nothing in it

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to support the FTC's contention here. From the Davis paper and other writings and decisions, it may be said the eliminations on official notice are not as narrow as those which control judicial notice. Davis dstinguishes between "legislative facts" and "adjudicative facts," indicating greater latitude for an ageney to find "legislative facts" than "adjudicative facts." From our reading, we glean that "legislative facts" involve generalized factual propositions which could form the basis for a legislative ruling which would have application to some class of situations, while "adjudicative facts" relate to, and are determinative of, one individual situation or course of conduct. However elusive this solution by categories may be in marginal cases, we are confident that the testimonial facts from which the Commission found that Automotive Jobbers was a sham, and such sham was permitting the members of AJI to gain a competitive advantage over others, were unquestionably "adjudicative facts." The critical noticed facts from which the Commission made, also by official notice, its dispositive finding of violation by Automotive Jobbers did not rest upon its "accumulated knowledge" or its experience or expertise, but rather upon the testimony of individual

witnesses in a particular prior case. By moving that evidence into the case against Dayco by the implement of official notice, it convicted Dayco of violating the statute. We believe that the most enlightening discussion of the question before us is contained in a recent treatise by Frank E. Cooper, a distinguished practitioner of the Detroit Bar and Professor of Law at the University of Michigan. While his two-volume work bears the title "*State* Administrative Law," his observations are relevant to the entire field of official notice. We find the following dispositive here:

> "It needs no argument to demonstrate that agencies may not take notice of the 'litigation facts' involved in a particular case; to do so would be to shift the burden of proof and make a mockery of the hearing procedure. The doctrine of notice should be limited to facts of a general nature, representing generalizations distilled from repeated demonstrations." Cooper, State Administrative Law, Vol. 1, p. 413.

[3] We need not cite any authority for the proposition that the burden of proof in this case was on the Commission. Its own rule, 16 C.F.R. § 3.14, provides that, "Counsel supporting the complaint shall have the burden of proof * * *." We think the Administrative Procedure Act, 5 U.S.C. § 1006, must be read as supporting such rule. We are aware that properly employed official notice may assist an agency in meeting its burden. The FTC argues that Dayco could have undertaken to disprove what the FTC had

already adjudicated in a case in which it had no part, in which it had no opportunity to cross-examine the witnesses sworn, or otherwise to test the validity of the evidence which moved the FTC to make its decision. Dayco could, says the FTC, examine the record in the AJI case, examine the evidence taken, search out the witnesses sworn and if they were still available and it was thought advisable, bring them in for further cross-examination, even though cross-examination made long after the witnesses' testimony had been given would be of doubtful value. The Automotive Jobbers, Inc., had by the time the FTC took its official notice of its character and internal operations, ceased to exist as a corporation.

The FTC cites as a precedent for its action here its own decision in Manco Watch Strap Co., Inc., 60 FTC 495 (1962). That involved a charge of unfair trade practice arising from the "sale of watch bands not adequately marked in the packaging thereof or otherwise with the country of origin." While there was evidence in the particular case on the point, the Commission appears to have taken official notice of the fact that American consumers generally prefer American made goods and, in the absence of clear markings otherwise, assume that goods are of domestic

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origin. Relying upon its relevant knowledge acquired

in a long line of cases, the Commission held that it had the right to take official notice of the above habits of the American buyers. It said,

> "If this were the first foreign-origin product case to come before the Commission, the conclusion that a substantial segment of the public assumes that unmarked watch bands are American-made and prefers such domestically-made bands would have to be based on specific evidence. But this is not a case of first impression; rather *it follows scores, if not hundreds, of others involving fundamentally the same general* factual issues."[2] (Emphasis supplied.)

The quoted language at once distinguishes *Manco* from this case, where the basic official notice was taken from the evidence of a single case which did not deal with general accumulated knowledge of buying habits of American people but with the method of operation of one business enterprise, Automotive Jobbers, Inc.

One aspect of the Commission's official notice may have come closer to a matter appropriate for official notice. That was its finding that,

> "The automotive parts industry is a highly competitive business involving small margins of profit. Typically automotive parts jobbers realize a net profit after taxes of less than five per cent, and the net prices paid by jobbers is of such importance that they are careful to take advantage of a discount as small as the two per cent

[2]The Manco decision was approved in another watch band case decided by the FTC and affirmed by the D.C.Circuit. *Brite Mfg. Co.* v. *FTC*, 347 F.2d 477, 478 CA D.C., 1965).

> cash discount prevalent in the industry, in paying their bills, the failure or inability to take such a discount being of the utmost economic importance to such jobbers' competitive existence."

It cited a large number of cases previously litigated from which it gained the above knowledge. Responsive to Dayco's challenge that the cases relied upon related to conditions antedating the events involved here, the Commission observed that it had concerned itself with the problems of this industry for a decade, and said "Our investigation and research involving this industry have been continuous and unrelating (sic) over that period." We assume this was to say that it had acquired knowledge independently of litigated cases. A view that the Commission's official notice of general conditions, as last quoted, was permissible will not save the indispensable balance of the official notice from impropriety.

[4] Because they are not apposite and provide little help, we shall not extend this opinion by review of the many authorities cited by the opposing counsel in their briefs. To us the procedural impropriety of the Commission's use of official notice as a substitute for proof is plain. It requires vacation of the order finding Dayco guilty of violation of Section 2(a) of the Robinson-Patman Act, vacation of its cease and desist order entered pursuant thereto. It is so ordered.

2) *Price fixing.*

Count II charged Dayco with violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 by attempt to fix the resale price of its products. The Commission sustained the charge.

[5, 6] Prior to 1958 a contract between Dayco and its warehouse wholesaler customers provided that "you will bill your outlets and collect from them. Such charges shall be on Dayton Rubber recommended schedule of charges." Jobbers (known as indirect or "A" jobbers) who purchased from warehouse wholesalers and from jobbers obtaining their merchandise directly from Dayco (known as "AA" jobbers) signed contracts with their sources of supply which provided,

> "The jobber agrees to purchase his requirements of Dayton Automotive Products through sourecs of supply as designated. In consideration

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> of this agreement, the jobber is entitled to prices in effect for A jobbers at time of shipment."

The trial examiner and the Commission considered that the latter language evidenced the indirect purchasers' (A jobbers) assent to all terms of Dayco's contract with its AA (wholesale) jobbers, and said,

> "Considered in this light, respondent, its direct purchasers, and its indirect purchasers have, through this agreement, entered into a conspiracy

to fix the price at which the direct purchasers will resell respondent's products to the indirect purchasers."

It was undisputed that after September, 1958, Dayco adopted new forms which eliminated the quoted and objectionable provisions. However, the examiner found that there had been no attempt to renegotiate the old contracts and that some remained in effect. Dayco's sales manager testified that both before and after September, 1958, no attempt was made to enforce any resale prices. We, however, cannot find the Commission's factual conclusions in this regard without substantial support.

Contracts or combinations to fix prices are illegal per se. United States v. McKesson & Robbins, 351 U.S. 305, 308, 76 S.Ct. 937, 100 L.Ed. 1209 (1956); United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 489, 70 S.Ct. 711, 94 L.Ed. 1007 (1959); United States v. Socony-Vacumm Oil Co., 310 U.S. 150, 221-223, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). Even though the supporting evidence is thin, the FTC found some residual price fixing effect from the early but discontinued forms of agreement. The evidence on this phase of the case was not dependent on any official notice. The Commission's decision in this regard and paragraph 2 of its cease and desist order are affirmed.

This cause is remanded to the Federal Trade Com-

mission for further proceedings consistent with this opinion.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAFEWAY STORES, INCORPORATED; CONTINENTAL BAKING COMPANY; LANGENDORF UNITED BAKERIES, INC.; HANSEN BAKING COMJANY, INC., RICHARD HOYT; BUCHAN BAKING CO., and GEORGE B. BUCHAN, *Petitioners,* v. FEDERAL TRADE COMMISSION, *Respondent.*	No. 19,325

FINAL DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST

Petitioners, Safeway Stores, Incorporated, Continental Baking Company, Langendorf United Bakeries, Inc., Hansen Baking Company, Inc., Richard Hoyt, Buchan Baking Co., and George B. Buchan, having filed in this Court petitions to review and set aside an order to cease and desist issued against them on December 3, 1964, by the Federal Trade Commission, respondent herein; and respondent having thereafter certified and filed herein a transcript of the record in the proceding upon which the order to cease to desist was based; and the matter having been heard by this Court on briefs and oral argument on February 11, 1966, and the Court having rendered its decision and opinion on September 14, 1966, affirming said order in its entirety;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED by this Court that the relief prayed for in the aforesaid petitions to review and set aside the order of the Federal Trade Commission be, and it hereby is, denied; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the order of the Federal Trade Commission, as heretofore affirmed, be, and it hereby is, enforced, and that petitioners be, and they hereby are, commanded forthwith to obey and comply with the terms of said order of the Commission.

CHARLES M. MERRILL
JAMES R. BROWNING
WALTER ELY
United States Circuit Judges

FILED
November 23, 1966
WM. B. LUCK, *Clerk*

Dated: